UNITED NATIONS

United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

Rome, Italy
15 June-17 July 1998

Distr.
GENERAL

A/CONF.183/C.1/SR.9
20 November 1998

ORIGINAL: ENGLISH

COMMITTEE OF THE WHOLE

SUMMARY RECORD OF THE 9th MEETING

Held at the Headquarters of the Food and Agriculture Organization of the United Nations on Monday, 22 June 1998, at 10 a.m.

Chairman: Mr. P. KIRSCH (Canada)

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The meeting was called to order at 10.10 a.m.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (*continued*) (A/CONF.183/2/Add.1 and Add.1/Corr.1)

Part 3 of the draft Statute (*continued*) (A/CONF.183/C.1/WGGP/L.4 and Corr.1)

1. **The CHAIRMAN** invited the Coordinator for Part 3 and Chairman of the Working Group on General Principles of Criminal Law to give a progress report.

2. **Mr. SALAND** (Sweden), Coordinator for Part 3 and Chairman of the Working Group on General Principles of Criminal Law, said that paragraph 1 of article 22 on non-retroactivity was not disputed and could therefore be submitted to the Drafting Committee. In informal consultations, it had been agreed that any outstanding issues could be covered by a paragraph 1 *bis*. Paragraph 1 of article 24, on irrelevance of official position, had already been submitted to the Drafting Committee, which could undoubtedly also address the drafting suggestions made in respect of paragraph 2 of that article. Following a discussion on article 27 ("Statute of limitations"), it had been agreed that the issue that had been raised related more to Part 9 ("International cooperation and judicial assistance"). Subject to those understandings, the Committee might wish to approve the articles as they appeared in document A/CONF.183/C.1/WGGP/L.4 and Corr.1.

3. **Mr. GARCIA LABAJO** (Spain) said that he had no objection to the referral of the articles to the Drafting Committee, but it was his understanding that the title of Part 3 and the possibility of moving paragraph 1 of article 22 to Part 2 remained open.

4. **The CHAIRMAN** said he took it that the Committee agreed to refer to the Drafting Committee the following articles: article 21; article 22; article 23, paragraphs 1, 2, 4 and 7, apart from 7 (c); article 24, paragraph 2; article "X" (former article 26); article 27. He further took it that the Committee agreed to the deletion of paragraph 3 of article 23, paragraph 4 of article 29 and the bracketed second paragraph of the definition of the crime of genocide in article 5.

5. *It was so decided.*

Part 2 of the draft Statute (*continued*) (A/CONF.183/C.1/L.1 and L.4)

6. **Ms. WONG** (New Zealand) referred to the "Further option for articles 6, 7, 10 and 11" following draft article 13 in document A/CONF.183/2/Add.1, and said that her delegation supported the texts proposed there for subparagraph (a) of article 6 and for the second subparagraph (b) (concerning the Security Council) of the same article.

7. The argument against Security Council referral put forward at an earlier meeting on the basis of the political nature of the Security Council was difficult to accept. State referrals would also be political; that was entirely appropriate. The suggestion to provide for referral by the United Nations Commission on Human Rights was an interesting idea, and it might be useful to consider creating a nexus between the United Nations human rights machinery and the Court.

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8. In relation to the further option for article 7, New Zealand supported the option of the Court having inherent or universal jurisdiction without a need for express State consent. The Court would then have jurisdiction over the core crimes which were already crimes of universal jurisdiction irrespective of whether States were party to the Statute or not, and would be able to exercise its jurisdiction regardless of whether the territorial State had accepted its jurisdiction. Under that approach, articles 7 and 9 would not be necessary.

9. The proposal by the Republic of Korea for an expanded list of categories of States, any of which could provide the necessary consent, went some way to creating a legal nexus between the event and the Court. One of the States involved in the event would need either to be a party or to give its express consent, but the action could not be blocked by other States. The requirement for State consent under that proposal would not be cumulative, but her delegation still saw a problem in any approach that required State consent, because the Court would have no jurisdiction over a crime committed entirely within the territory of a non-State party unless that State consented or the Security Council took action.

10. The suggestion by the French delegation that it should be necessary for the State of territory and possibly the State of nationality to consent might create a problem by enabling a State whose national had committed serious crimes in another State to withhold its consent and shield the accused. That would not contribute to enhancing peace and security, which was a major reason for creating the Court. New Zealand consequently favoured the deletion of paragraph 2 of article 7 and an amendment to paragraph 3 of article 7 as proposed by Germany. It might be willing to consider the approach of the Republic of Korea as an alternative.

11. **Mr. PIRAGOFF** (Canada) said that Canada was committed to a court with inherent or automatic jurisdiction over the three core categories of crime: genocide, war crimes and crimes against humanity. An "opt-in" or State consent regime would allow States to veto Court action and would render the Court ineffective. The number of States whose acceptance was required must be kept to the minimum.

12. Article 6 should allow Court jurisdiction to be triggered by any State party, and States parties should refer situations rather than specific cases. Canada supported the further options for articles 6, 7 and 11 as the best bridge between different positions and a basis for real progress.

13. **Mr. NIYOMRERKS** (Thailand) thought that State consent to the Court's jurisdiction was indispensable for the Court to exercise it function.

14. His delegation supported the proposal made by the Republic of Korea for paragraph 1 of article 6. Regarding paragraph 2 of article 6 as it appeared in the first version of that article in document A/CONF.183/2/Add.1, the words "only if the States which have jurisdiction over the case in question have accepted the jurisdiction of the Court in accordance with article 9" should be retained.

15. With regard to preconditions to the exercise of jurisdiction, his delegation supported the article 8 proposed by the Republic of Korea. On article 9, his delegation preferred option 1, with inherent jurisdiction remaining intact. On the referral of a situation by a State, his delegation preferred the draft article 11 in the "Further option for articles 6, 7, 10 and 11".

16. **Mr. HAMDAN** (Lebanon) said that the Court's powers should be exercised following an initial request by a State. Technical problems would arise if intergovernmental organizations were allowed to bring complaints before the Court. However, under article 8 the Court should be able to consider crimes falling within its competence which

began before but continued after the entry into force of the Statute. The phrase "unless these crimes continue" should therefore be added at the end of paragraph 1 of article 8.

17. Paragraph 4 of the first version of article 7, under which a State not a party to the Statute could agree to the competence of the Court, was acceptable. With regard to article 10, option 1 for paragraph 4 and both options for paragraph 7 were unacceptable as the Court should not have to wait until the Security Council took a decision on the question of a military threat, act of aggression or breach of the peace.

18. Under article 11, complaints should be submitted on the basis of full information which should first be examined by the Pre-Trial Chamber in accordance with article 13. It was inappropriate to assign any role to non-governmental organizations in articles 12 or 13.

19. **Mr. POLITI** (Italy) said that each State party to the Statute should be authorized to lodge complaints. There was much merit in the idea that States parties should refer to the Court situations in which one or more crimes within the Court's jurisdiction appeared to have been committed. It would then be up to the Prosecutor to determine whether one or more specific persons should be charged with the crimes. Both those points were well reflected in the drafts for articles 6 (a) and 11 in the "Further option for articles 6, 7, 10 and 11", and his delegation supported them.

20. With regard to the preconditions to the exercise of jurisdiction and acceptance of jurisdiction in articles 7 and 9 of the draft Statute, including article 7 in the "Further option for articles 6, 7, 10 and 11", Italy strongly supported a system of inherent Court jurisdiction over core crimes under customary international law, and consequently opposed any regime requiring specific consent by the States concerned other than the consent given in becoming parties to the Statute. The German proposal included in the "further option" for article 9 was fully consistent with Italy's approach and would obviate any loopholes in the jurisdiction provisions of the Statute. However, given the major difficulties that a number of States had with the German proposal, it would be more realistic to follow the United Kingdom approach reflected in article 7 in the "Further option for articles 6, 7, 10 and 11". In that connection, limiting the requirements referred to in paragraph 2 of article 7 to the territorial State would be an improvement, but the problem remained that to require the territorial State to be a party to the Statute or to have accepted the jurisdiction of the Court would impose severe restrictions on the Court's ability to intervene in cases of genocide and crimes against humanity. He supported the views of the representative of New Zealand in that regard. The United Kingdom proposal should be amended along the lines suggested by the Republic of Korea, although Italy remained flexible as to whether all the jurisdictional links suggested by the Republic of Korea should be listed in article 7 or only the custodial State and territorial State links proposed by the United Kingdom. What was important was for the criteria to be alternative and not cumulative, in order to ensure a proper balance in the jurisdiction provisions of the Statute and a sufficiently wide opportunity for the Court to perform its functions.

21. **Mr. SCHEFFER** (United States of America) said that the United Kingdom text for article 6 in the "Further option for articles 6, 7, 10 and 11" was acceptable with the deletion of the bracketed subparagraph (b). Like other delegations, the United States believed that States should refer whole situations and not individual cases, so as to be more comprehensive and fair.

22. Like many other delegations, the United States was inclined to support the United Kingdom text for paragraph 1 of article 7, but noted that it was based on the assumption that the definitions for each crime would be satisfactory, including detailed elements in an annex to the Statute. In the light of the continuing concerns of Member States, the United States reserved its position on requiring the consent of States, even if they were parties to the Statute, on a case-by-case basis, as set forth in option 2 in the first version of article 7.

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23. With regard to universal jurisdiction, the United States supported the United Kingdom text for paragraphs 2 and 3 of article 7. It was essential that the reference to the State of nationality of the suspect as set forth in paragraph 2 (a) should be retained. On that issue, the United States agreed with the view that the universal jurisdiction proposal for the Court would represent an extraordinary principle, in conflict with certain fundamental principles of international law, and would undermine the Statute generally. The proposals by Germany and the Republic of Korea would have the effect of applying a treaty to a State without that State's consent, and in the absence of any action by the Security Council under Chapter VII of the United Nations Charter. Even if a State was not a party, the Court would have jurisdiction to judge its official acts and imprison even its head of State. Such a situation could not be justified on the basis of existing law and the United States objected to it in principle. An international treaty could not impose itself in that manner on non-party States; the only solution was to reach out to other States through the United Nations Charter and the powers of the Security Council that had been created by States under that separate treaty regime.

24. With regard to the States which must consent, the consent regime must include a non-State Party whose official actions were alleged to be crimes. That might be the State on whose territory a crime had occurred but, in the case of peacekeeping or international conflict, it might be another State: the State which had sent the troops concerned. That State should be responsible for their prosecution or for consenting to their prosecution by the Court.

25. Article 8 was acceptable.

26. **Ms. CUETO** (Cuba) said that States parties to the Statute should be those responsible for initiating Court action, and the principle of consent and complementarity was an essential basis for the jurisdiction of the future Court. Only the application of those principles could foster universal acceptance of the jurisdiction of the Court and promote its credibility and effectiveness. Arguments in favour of inherent jurisdiction were not convincing. The regime of consent would not prevent States parties from accepting the competence of the Court, by express declaration, in relation to basic core crimes defined in the Statute. An optional regime of acceptance would encourage most States to ratify the Statute and accept the action of the Court as a new international judicial body. In that context, Cuba favoured option 2 in the first version of article 7.

27. **Mr. EL MASRY** (Egypt) said that his delegation attached great importance to the principle of inherent jurisdiction, which was closely linked to the principle of complementarity, and considered that the State should be the principal mechanism for triggering Court action.

28. Under all the options, "aggression" was seen as aggression against a State or the political independence or territorial integrity of a State, but there could be aggression against a territory that was not an integral part of a State but was under its sovereignty. Previously, for example, Gaza, though not part of Egypt, had been administered by Egypt. The text should therefore also refer to territories.

29. Egypt agreed that the Court's jurisdiction should cover a State that was not a party if that State accepted the jurisdiction of the Court and if the accused came under the jurisdiction of that State or the act had occurred in its territory.

30. **The CHAIRMAN**, summing up the discussion so far, said that some States had made the point that the jurisdiction of the Court should primarily be triggered by States. Many delegations had expressed the view that upon becoming a party to the Statute, a State should automatically accept the Court's jurisdiction over the core crimes. Other States believed that an additional jurisdictional link, such as a declaration, was a precondition to the

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exercise of jurisdiction. Some delegations called for the consent of one or more of the following: the territorial State, the custodial State, the State of nationality of the accused and the State of nationality of the victim. Some States preferred cumulative consent, while others preferred that the consent of one of the States should suffice.

31. It had also been noted that if the States concerned were not party to the Statute, the Court could exercise jurisdiction with their consent. Some delegations had felt that no additional consent was necessary, but there had been objections to that contention.

32. The view had also been expressed that the automatic acceptance of the Court's jurisdiction should only apply with respect to genocide and crimes against humanity, and that war crimes should not fall under that system but be governed by another jurisdictional regime. Some delegations, however, did not favour an automatic acceptance of the jurisdiction of the Court, feeling that not providing for automatic acceptance but allowing States to make declarations of acceptance of the Court's jurisdiction would facilitate the entry into force of the Statute.

33. Most delegations felt that any State party to the Statute should be able to trigger the Court's jurisdiction, but some delegations thought that only interested States should be able to do so. Some had argued that States not parties should be able to trigger the Court's jurisdiction in exceptional circumstances, while others had felt that that should not be the case.

34. Most States felt that situations should be referred to the Court rather than individual cases, but the possibility of referring matters had also been suggested. It had been agreed that the automatic acceptance system would not apply to treaty crimes if they were included.

35. A number of delegations had referred to the "Further option for articles 6, 7, 10 and 11" and many had suggested that the structure used in that option might serve as a basis for discussion.

36. He invited further comments.

37. **Mr. EFFENDI** (Indonesia) said that the Court offered a wide range of benefits and that his delegation would return to the articles on jurisdiction at a later stage, after the Committee's deliberations on articles 15, 16 and 17 on admissibility, article 18 on *ne bis in idem* and article 19, which were all closely related to the principle of complementarity which the Court should uphold.

38. **Mr. CHERQUAOUI** (Morocco) said that Court action should be triggered by a State party. If the Court was to be as universal as possible, States should be allowed to decide whether or not they accepted its jurisdiction, at least during the initial phase following its establishment.

39. Morocco supported the second option in article 8 and option 2 for article 11.

40. **Mr. PANIN** (Russian Federation) said that his delegation could not agree with the proposals of Germany and the Republic of Korea whereby the jurisdiction of the Court triggered by the complaint of a State could also extend to non-parties, as that approach was not consistent with international law. The Russian Federation was also unable to agree that an international treaty could create obligations for third parties which were not party to it. The only way the Court could exercise jurisdiction over a non-party was by means of a Security Council decision.

41. The Russian Federation saw the Court as exercising eminent jurisdiction when a situation was referred to it by the Security Council and when there were complaints from States in connection with the crimes of genocide

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and aggression. The agreement of the State affected was not necessary in such cases. In other cases, such as crimes against humanity and war crimes, jurisdiction should be exercised with the agreement of the State on whose territory the crime was committed and the custodial State. Such agreement could be general or relate to specific cases.

42. **Mr. GÜNEY** (Turkey), referring to article 6, said that only States parties and the Security Council acting under Chapter VII of the Charter should be able to refer matters to the Court. In that context, it was more appropriate to use the word "matters" than "situations".

43. With regard to article 7, the exercise of jurisdiction required express State consent. Turkey consequently favoured option 2 for paragraph 1. It considered that paragraph 2 should be deleted.

44. Article 8 ("Temporal jurisdiction") should be retained but Turkey was flexible as to its location. With regard to article 9 ("Acceptance of the jurisdiction of the Court"), Turkey was against inherent and universal jurisdiction and believed that further consent was necessary. In that connection, the German proposal was useful but did not take account of the reluctance or concerns of the international community in respect of obligatory jurisdiction.

45. The proposal made by the Republic of Korea merited consideration and should be carefully and thoroughly examined. Express consent was required at the present stage.

46. **Mr. DIAZ LA TORRE** (Peru) favoured an independent court with jurisdiction over the core crimes. Its action could be triggered by States. States parties had an inherent right to present complaints, and the Court's jurisdiction should only be exercised over States parties to the Statute. Non-parties should consent to the Court's jurisdiction when necessary by means of the declaration referred to in article 7.

47. **Mr. DA COSTA LOBO** (Portugal) said that, by becoming parties to the Statute, States implicity accepted the jurisdiction of the Court in relation to all core crimes. There was no need or place for any other form of acceptance. Portugal endorsed the position of the German delegation with regard to States not parties to the Statute. The solution proposed would result in a more effective tribunal and was in harmony with international law.

48. **Mr. PALIHAKKARA** (Sri Lanka) said that the proposals made by the United Kingdom and France provided a useful basis for discussion with a view to finding a middle ground between inherent jurisdiction and consent at each and every stage. An inclusive approach on the important issues of consent and jurisdiction was desirable. In that context, consensus would not be assisted by further expanding the referral provisions in the draft Statute.

49. **Mr. MADANI** (Saudi Arabia) said that the words in square brackets should be deleted in paragraph 1 (b) of the first version of article 6, and the opening clause of that paragraph should begin "The Court may exercise its jurisdiction ...". His delegation favoured the "option 2" text in article 7, with the deletion of the words in square brackets; it preferred option 2 for article 9 and it favoured option 2 for article 11, with subparagraphs (a), (c) and (d).

50. **Mr. AL AWADI** (United Arab Emirates) said that his delegation would prefer the deletion of the words "or a non-State party" in paragraph 1 (b) of article 6 and favoured option 2 in article 7, with certain amendments which would be submitted to the relevant working group.

51. His delegation preferred option 2 for article 9, but had reservations on paragraph 4. In regard to article 11, option 2 was preferable to option 1 provided that the right was limited to the State on whose territory the act had

taken place, the State of nationality of the suspect and the States of nationality of the victims. In the text for article 6 in the "Further option for articles 6, 7, 10 and 11", the opening clause and subparagraph (a) also met his delegation's concerns.

52. Ms. DIOP (Senegal) said that her delegation supported the text for article 6 in the "Further option for articles 6, 7, 10 and 11", and the concept of inherent jurisdiction of the Court in article 7, paragraph 1. It was particularly important that a State's acceptance of jurisdiction should be totally transparent and complete. Any State becoming a party should accept and respect the obligations and commitments imposed by the Statute. Further express consent or case-by-case consent would not be necessary. In that connection, the proposals of the United Kingdom and the Republic of Korea provided an excellent basis for compromise.

53. On the question of non-parties, Senegal agreed with the United Kingdom and Republic of Korea proposals, which might be merged to allow a non-party to make a declaration of consent or acceptance to the Secretary-General of the United Nations rather than to the Court's Registrar.

54. Referral to the Court by States and by the Security Council should be based on situations rather than cases. In that connection, Senegal agreed with paragraphs 1 and 2 of article 11 in the "Further option for articles 6, 7, 10 and 11", but not with paragraph 3.

55. Mr. PHAM TRUONG GIANG (Viet Nam) said that unless the principle of complementarity was adequately and clearly incorporated into the Statute, the Court would face certain difficulties. His delegation therefore favoured the opt-in option, which appeared to be in accordance with international law and practice.

56. With regard to article 6 (first version), Viet Nam would support paragraph 2 if the bracketed words "only if the States which have jurisdiction over the case in question have accepted the jurisdiction of the Court in accordance with article 9 and" were retained. Option 2 in article 7 appeared to be in accordance with international law and practice and was therefore acceptable.

57. Mr. KERMA (Algeria) said that his delegation was in full agreement with the statement adopted recently at Cartagena by the States members of the Non-Aligned Movement, calling for the Court to be free from political influence of any kind, particularly from the Security Council, and reaffirming that the Court's jurisdiction should be based on the consent of the States concerned. Those points would be essential in ensuring the success of the Court.

58. Algeria was in favour of paragraph 1 of article 6. The Court should exercise jurisdiction not only in respect of the core crimes but also in respect of treaty crimes. Only States parties to the Statute or States with an interest in a situation or case being referred to the Court, in line with the principle "no interest, no action", should be able to refer matters to the Court. The door should nevertheless be left open to non-parties to refer matters to the Court under certain conditions, some of which were already provided for in the draft Statute. State consent was fundamental. The consent of at least two States should be required: the State of nationality and the State of custody. Algeria had reservations on paragraph 1 (c), but otherwise favoured paragraph 2.

59. Algeria also preferred option 2 for article 9 and for article 11. With regard to article 10, its position was in line with what he had said at the beginning of his statement, although it recognized the essential role of the Security Council in maintaining international peace and security.

60. **Ms. KAMALUDIN** (Brunei Darussalam) said that her delegation had no problem with the referral of a situation by a State party in accordance with article 6 (in the "Further option for articles 6, 7, 10 and 11"), and was giving careful consideration to the proposal of the Republic of Korea for article 8, in respect of the requirement of State consent.

61. **Mr. ABDELKADER MAHMUD** (Iraq) said that only the State concerned should trigger the article 6 mechanism; the sovereignty of the State concerned should be safeguarded, and there must be no outside influence.

62. His delegation was in favour of option 2 in article 7 (first version); it supported paragraph 1 of article 8 with the removal of the square brackets; and it preferred option 2 for article 9. With regard to article 10, the Court must be independent of any political body. It was therefore unacceptable for the Security Council to have a role in the Court, bearing in mind the veto right given to certain States and the Council's membership and method of voting.

63. Iraq favoured option 2 in article 11 and the deletion of paragraph 4.

64. **Mr. KOFFI** (Côte d'Ivoire) said that, while the German proposal was attractive, the underlying concept had not as yet gained universal acceptance and therefore could not be supported for the time being.

65. The United Kingdom proposals, on the other hand, provided a sound basis for discussion and were acceptable. Non-parties should not have the right to lodge complaints and the word "situation" was more appropriate than "matters". His delegation had no objection to the Security Council referring a matter to the Prosecutor of the Court, pursuant to Chapter VII of the United Nations Charter. Regarding article 7 (see the "Further option for articles 6, 7, 10 and 11"), it supported the acceptance of jurisdiction by States; acceptance by either the territorial or the custodial State should be required. The requirement should be alternative and not cumulative in nature.

66. Acceptance by non-parties should be the subject of an express declaration, as provided for in paragraph 3 of article 7.

67. With regard to article 10, in view of the importance of covering aggression in the Statute, the role of the Security Council in such situations must be reflected and would not prejudice either the independence of the Court or its final decision.

68. **Mr. FADL** (Sudan) noted that only States could establish an international court, on the basis of a general agreement. His delegation did not object to the proposals for Court action to be triggered by States, but the involvement of the Security Council might detract from the effectiveness of the Court. Two main issues were involved. The first concerned complaints by States. He thought that, in line with a proposal made during the Preparatory Committee's discussions, the question of acceptance by the complainant State of the jurisdiction of the Court with respect to the crime concerned need not be considered; it would suffice to provide only that the complainant State should be a party to the Statute and an interested party. Furthermore, to give the Court inherent jurisdiction would favour a State that was not a party to the Statute, because in their case the consent of the custodial State or the territorial State or both would be required before the Court could exercise its jurisdiction, whereas in the case of States parties the Court would automatically exercise jurisdiction. That would discourage accession to the Statute.

69. The second point concerned the Security Council. The proposal was that the Council should be allowed to submit complaints to the Prosecutor or refer matters directly to the Court, without the consent of the State concerned being needed. That was dangerous; it was important that the Court should not be weakened.

70. His country supported the Non-Aligned Movement's statement concerning the establishment of the Court, adopted at Cartagena.

71. Mr. ROGOV (Kazakhstan) said that his delegation could not support proposals to extend the Court's jurisdiction to non-parties. He drew attention in that connection to the principle of non-retroactivity, according to which acts committed before the entry into force of the Statute were not in the Court's jurisdiction. Now under draft article 114, following the entry into force of the Statute it would take effect for each subsequently ratifying State only after such ratification. How then could it be applied in practice to the citizens of non-party States, which had not ratified it?

72. Mr. BU-ZUBAR (Kuwait) said that jurisdiction should apply to States parties only, and the reference in paragraph 1 (b) of article 6 to a "non-State party" should be deleted. Furthermore, the wording concerning the acceptance by States of the jurisdiction of the Court should perhaps be made more specific, by referring to the acceptance of jurisdiction with respect to a case that was the subject of a complaint lodged by a State.

73. Article 8 ("Temporal jurisdiction"), as the representative of Lebanon had pointed out, did not cover acts that began before but continued after the entry into force of the Statute. Care should be taken not to bar prosecution for such acts, and the words "unless the crimes continue after that date" should be added at the end of paragraph 1.

74. Ms. SHAHEN (Libyan Arab Jamahiriya) said that the exercise of the Court's jurisdiction should be based on State consent, in order to satisfy the principle of complementarity. The jurisdiction of the Court could not be split in the sense of having an inherent jurisdiction for some crimes such as genocide and an optional jurisdiction for other crimes. Her delegation supported the principle of acceptance of jurisdiction, rather than that of inherent jurisdiction, and was in favour of option 2 for articles 9 and of option 2 in both article 7 and article 11.

75. Mr. BELLO (Nigeria) said that his delegation believed in the principles of consent and complementarity and consequently fully approved the preamble to the Statute, in which the latter concept was clearly set out. It also believed that only States parties should, under article 6, have the power to refer matters to the Court, and was consequently in favour of paragraph 1 without subparagraphs (a) and (c), and of paragraph 2.

76. In setting up the Court, the international community was doubtless mindful of the many problems which had hindered such a move in the past, including the failure of the Security Council to act fairly and decisively in matters of global concern. Without prejudice to the powers of the Security Council under Chapter VII of the United Nations Charter, his delegation felt that the Security Council should have no role whatsoever with regard to referral of matters to the Court.

77. Nigeria was unable to support the power of the Prosecutor ex officio to refer a matter to the Court: the Prosecutor could not be given such wide powers with no checks or balances.

78. The Nigerian delegation preferred option 2 in each of the articles 7, 9 and 11; paragraph 4 of article 11 should be deleted.

79. Mr. BAZEL (Afghanistan) said that, in article 6, paragraph 1 (a), his delegation supported the referral of a "situation" to the Court. The proposal that the Commission on Human Rights should be able to refer matters to the Court was interesting. In addition, his delegation proposed provision for referral by the International Committee of the Red Cross.

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80. With regard to State consent, his delegation supported the principle of complementarity. Without the cooperation of the States concerned, the Court would encounter numerous difficulties in carrying out its tasks. Afghanistan therefore supported option 2 in article 7. It also firmly supported the inclusion of aggression as a core crime in the Statute. The Court should deal with the matter independently and impartially and without pressure from other institutions.

81. **The CHAIRMAN** said that the Secretariat had taken note of the all the positions stated. Delegations that had not already done so were now invited to give their views on the role of the Prosecutor.

82. **Mr. SHARIAT BAGHERI** (Islamic Republic of Iran) said that his delegation believed that it would be premature to give the Prosecutor the power to initiate investigations on his own. The Court would be established on the basis of a multilateral treaty and would be an international criminal court but not a supranational court, justifying the Prosecutor having ex officio powers of investigation. Moreover, the granting of ex officio power to the Prosecutor might lead to a conflict of competence between the Court and national courts, to international problems between the Court and States and ultimately to undermining the credibility of the Court. For those reasons, paragraph 1 (c) of article 6 and article 12 should be deleted.

83. The initiation of proceedings by the Prosecutor under the supervision of the Pre-Trial Chamber, as proposed in article 13, was not an acceptable formula. The trigger mechanism should be limited to States, individually or collectively, and situations should be referred by the Security Council only.

84. **Mr. MOCHOCHOKO** (Lesotho) said that his delegation was in favour of inherent jurisdiction of the Court and was opposed to any State consent regime. If an independent and effective Court was to be established, it was essential that the Prosecutor should have the authority to initiate investigations ex officio. If investigations and prosecutions could only be triggered by States and to some extent by the Security Council, the functioning of the Court would be dependent on the political motivations of those entities and as a result be severely hampered, because in practice States and the Security Council would be reluctant, or unable, to lodge complaints or refer situations to the Court.

85. For the powers of the Prosecutor, Lesotho preferred the bracketed subparagraph (b) of article 6 in the "Further option for articles 6, 7, 10 and 11", as it was more precise than the original article 6. It was not in favour of article 7 in that option, which would constitute a further impediment to the Court's effective functioning as a complement to national criminal jurisdictions. If that provision was intended to cover non-parties, that should be clearly stated.

86. His delegation agreed with the overall tenor of article 12 and believed that it should be up to the Prosecutor to decide whether or not to proceed with an investigation. To preserve prosecutorial independence, the word "may" would be preferable to "shall" in the first line. The contribution of information from victims, in addition to information from other sources, would be particularly significant in bringing perpetrators to justice, and the text allowing the Prosecutor to receive information from any source should be retained.

87. With regard to article 13, a fully independent Prosecutor subject only to judicial confirmation of indictments at the conclusion of an investigation would be preferable. While judicial review of the decision to commence investigations might seem useful in ensuring fairness, such a review might be too great an impediment for the Prosecutor. If necessary, his delegation would be prepared to reconsider its position on that issue but, in order to make it clear that at that stage of the proceedings the Prosecutor was not required to prove a *prima facie* or probable cause, appropriate wording to that effect should be included in article 13 or elsewhere. Similarly appropriate

wording would be required to indicate that the Prosecutor was not prevented from resubmitting a request on the basis of fresh evidence.

88. Mr. NIYOMRERKS (Thailand) said that his delegation could accept paragraph 1 (c) of article 6 (first version), and paragraph 2 with the inclusion of the words "only if the States which have jurisdiction over the case in question have accepted the jurisdiction of the Court in accordance with article 9". It could agree to the Prosecutor initiating investigations ex officio on the basis of information obtained from any source, including non-governmental organizations, as provided for in article 12. It supported article 13 as it stood and endorsed the role of the Pre-Trial Chamber in considering the basis on which the Prosecutor should be allowed to proceed further with an investigation.

89. Mr. AL HUSSEIN (Jordan) said that, in the interests of an effective and credible Court, the Prosecutor would have to be in a position to refer matters to it, in compliance with the principle of complementarity, and to initiate investigations on the basis of information analysed responsibly and in a manner unaffected by international media coverage.

90. With regard to article 12, the Prosecutor should not be restricted as to the sources from which relevant information might be drawn, given the article 13 mechanism which, together with articles 47 and 48, would militate against an abuse of powers by the Prosecutor.

91. His delegation remained flexible as to the square brackets in article 12. The wider brackets around articles 12 and 13 should be removed.

92. Mr. KANDIE (Kenya) said that his delegation saw no reason why the Prosecutor would require ex officio powers to trigger Court action. The twin triggers of States and the Security Council, subject to appropriate controls, were sufficient to cover all cases which would need to go before the Court. Article 6 (c) and other provisions dealing with ex officio powers of the Prosecutor should therefore be deleted.

93. Mr. GONZALEZ GALVEZ (Mexico) said that the Prosecutor should be able to refer a matter to the Court, and to gather information from the sources mentioned in article 13.

94. To ensure independence, the judges in the Pre-Trial Chamber should not be the same as those in the Court itself or in the Appeals Chamber.

95. Mr. DIAZ PANIAGUA (Costa Rica) said that his delegation thought that the Prosecutor should be able to begin investigations on his own initiative, and that that power should be included in article 13. The independence of the Prosecutor and the Court and their freedom from political influence were adequately safeguarded. The Court should have inherent jurisdiction, as proposed by the German delegation.

96. Mr. RODRIGUEZ CEDEÑO (Venezuela) said that the Prosecutor should have autonomous competence and the right to refer matters to the Court. In article 6 ("Further option for articles 6, 7, 10 and 11"), he thought that States parties or the Security Council should refer matters not to the Prosecutor but directly to the Court. In view of his independent status, the Prosecutor should be able to receive complaints both from States and from governmental or non-governmental organizations or individuals.

97. The Prosecutor should be able to receive information from any source and carry out the necessary inquiries before referring the matter to the Court. It was not necessary for the Court to have a pre-trial chamber to study

matters that would be submitted to it. Well-grounded and well-documented complaints submitted by States parties, the Security Council or the Prosecutor could be considered directly by the main chamber, and then there could perhaps be a higher body, such as an appeals court.

98. Mr. ASSHAIBANI (Yemen) said that, like many other delegations, his delegation had difficulty in accepting that the Prosecutor should be able to take the initiative to open investigations or present cases. That was a matter for States alone.

99. Mr. ABDELKADER MAHMUD (Iraq) said that the Prosecutor should not be able to take the initiative to open investigations or act on his own initiative, particularly as an individual might be susceptible to political influence.

100. Mr. TAÏB (Morocco) said that the Prosecutor should have an independent role and be able to initiate investigations ex officio. However, such action should be subject to the agreement of the Pre-Trial Chamber. Information should only be obtained from States and organizations in the United Nations system.

101. Mr. JANDA (Czech Republic) said that his delegation recognized the primary role of the State. It believed that the Prosecutor should be empowered to initiate proceedings before the Court on his or her own initiative. An ex officio Prosecutor would mean a more effective Court because the Court would thus be open to various sources, including non-governmental organizations and individuals. The competence of the Prosecutor should relate only to the core crimes, as set out in article 5.

102. His delegation was in favour of article 12.

103. Mr. EFFENDI (Indonesia) said that paragraph 1 (c) of article 6 should be deleted. The Prosecutor should not be able to initiate investigations *proprio motu*.

104. Mr. RAMA RAO (India) said that his delegation attached great importance to the impartiality and objectivity of the Prosecutor in conducting his functions of investigation and prosecution. The success of the Court would depend in great measure on cooperation among States aimed at punishing heinous crimes of international concern. While the Court's jurisdiction would be individual, the nature of the crimes was such that the reputation of Governments would inevitably come under scrutiny.

105. The necessary cooperation would not be promoted by allowing the Prosecutor to act on his own, on the basis of sources of information, regardless of their reliability. Such an ex officio role for the Prosecutor would jeopardize the principle of complementarity which was generally accepted as the basic foundation for the establishment of the Court.

106. Ms. CONNELLY (Ireland) said that, to be truly effective, an enforcement mechanism for international humanitarian law must allow victims an audible and direct voice which did not depend upon a State party or the Security Council for its expression. It was no accident that the first time the word "victim" appeared was in article 13 in relation to the information submitted to the Prosecutor. The Prosecutor should have the competence to receive information about a crime covered by the Statute directly and from any source, including victims, persons acting on their behalf and non-governmental organizations. The Prosecutor would have to sift the information received on the basis of objective criteria and assess whether there was a reasonable basis for an investigation. In that connection, it should be borne in mind that generally acceptable criteria had been used as early as the 1920s by the League of Nations in evaluating information submitted to it in the context of a regime for the

protection of minorities. At the present time, under the international human rights treaties, complaints had to satisfy a number of criteria if they were to be processed further.

107. Without the application by the Prosecutor of objective and generally accepted criteria in evaluating information, the credibility of the entire system would be undermined. The office of Prosecutor was a key institution in the structure and operation of the Court, and the person holding the office must have an excellent knowledge of criminal law and procedure and of the relevant international law, and be a person of the highest integrity and sound judgement. However, if the Prosecutor was to have the competence to receive information from a wide range of sources, it would be too great a responsibility for the evaluation of that information to rest with that person alone. The proposal in article 13 for a further safeguard in connection with the handling of such information, namely that it be subject to confirmation or rejection by a pre-trial chamber, was therefore a good one, and would make the Court more accessible and relevant to those affected by or concerned with violation of international humanitarian law. It would strengthen the Court's ability to act, and she hoped that it would be generally acceptable to States.

108. **Mr. IVAN** (Romania) said that an independent and effective international criminal court would require an independent prosecutor able to trigger ex officio the necessary jurisdictional mechanisms and refer matters to the Court. His delegation could nevertheless accept that, to prevent any abuse of power, the role of the Prosecutor should be subject to an independent pre-trial chamber.

109. The Prosecutor should be allowed to trigger the jurisdiction of the Court on his own initiative and not only following a decision by the Security Council or a State party. Concerns that there should be some safeguards in respect of the Prosecutor's authority were already partially addressed in the Statute by the creation of a pre-trial chamber, which would review all indictments submitted by the Prosecutor to determine whether or not a *prima facie* case existed and whether the admissibility requirement under article 15 had been met.

110. The proposals of the delegations of Germany and Argentina were complementary to the solution proposed by the United Kingdom delegation. The Romanian delegation was in favour of the United Kingdom proposal as a viable way of allowing ex officio prosecution and, at the same time, ensuring judicial reviews of the Prosecutor's actions.

111. **Mr. NATHAN** (Israel) said that his delegation was unable to support the proposal for ex officio, *proprio motu* investigations by the Prosecutor. Under the preamble, the Court was intended to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole. If the Prosecutor took over the proposed functions, a situation might result in which no complaints by States were put forward. Furthermore, there would be a risk of the Prosecutor being overburdened by a multitude of complaints from bodies of all kinds, including frivolous or political complaints which would adversely affect the Prosecutor's independence and standing. No parallel could possibly be drawn with the Statutes of the ad hoc tribunals for the former Yugoslavia and Rwanda, because there was no State involvement in those tribunals and investigations had to be conducted by the Prosecutor acting *proprio motu*.

112. Regrettably, investigations initiated by the Prosecutor without the backing of a complainant State were likely to be ineffective as he would be dependent on the cooperation and assistance of private or other bodies, and thus be deprived of the basic requirements for an efficient and effective investigation of the crime in question. Article 12 should therefore be deleted.

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113. With regard to the Security Council, under Article 24 of the United Nations Charter the Security Council had primary responsibility for the maintenance of international peace and security, a provision which might give the Security Council a role vis-à-vis the Court and might require the Security Council to refer matters to it in situations involving Chapter VII of the Charter. The role of the Security Council in that context was limited to situations arising under Chapter VII of the Charter and not under Chapter VI, which dealt with the settlement of disputes, with no necessary connection with the commission and prosecution of crimes subject to the jurisdiction of the Court.

114. With regard to the powers of the Security Council in relation to the determination of the existence of an act of aggression, it would be inappropriate at the present stage at least to include the crime of aggression in the jurisdiction of the Court. If, however, aggression was included in the Court's jurisdiction, determination by the Security Council under Article 39 of the Charter of the existence of an act of aggression should be a precondition to the exercise of the jurisdiction of the Court in so far as acts of aggression were concerned. That function, a basic function of the Security Council under Article 24 of the Charter, could not be ignored by the Statute, transferred to the Court or shared with the Court.

115. Another point arose regarding paragraph 2 of article 10 in the "Further option for articles 6, 7, 10 and 11". His delegation considered that, when the Security Council was seized of a situation, matters should be in abeyance in the Court, but not indefinitely. Israel supported the proposal made that, for a limited period—perhaps a period of 12 months, which could be extended for a further 12 months—matters should be in abeyance.

116. **Mr. ROWE** (Australia) said that his delegation agreed that the Prosecutor should have the authority to initiate investigations *proprio motu* in accordance with the provisions of article 12, provided that his actions were subject to appropriate procedural safeguards such as those provided for in article 13, which proposed *inter alia* that the authorization of a pre-trial chamber should be obtained before an investigation could proceed.

117. **Ms. SHAHEN** (Libyan Arab Jamahiriya) said that there was a role for the Prosecutor provided that it was subject to safeguards. The Prosecutor should not have the right to initiate Court action on his own initiative on the basis of information given or sought from other sources, but might conceivably open inquiries ex officio on receipt of a complaint from a State, and subject to the consent of the State on whose territory the information would be sought. It was not desirable for the Prosecutor to have to inform the Security Council of any complaints he might receive under article 11.

118. **Ms. CUETO** (Cuba) said that her delegation was not in favour of extending ex officio authority to the Prosecutor to trigger Court action. Conflicts of interest and jurisdiction would undoubtedly arise and politically motivated investigations could affect the credibility of the Court. A frank commitment to international cooperation was preferable to the so-called impartiality of one individual.

119. **Mr. EL MASRY** (Egypt) said that many States would be deterred from acceding to the Statute if the Court were to allow other persons to trigger Court action. Regarding the Prosecutor's right to receive information from any source, certain safeguards should be imposed, allowing the Pre-Trial Chamber to check the accuracy of information.

120. **Ms. WONG** (New Zealand) said that her delegation supported the position of Lesotho, Ireland and other States which had argued in favour of *proprio motu* powers for the Prosecutor to initiate investigations. It would prefer there to be no judicial review of the Prosecutor's independent powers, but accepted that there might be a need for a mechanism such as that proposed in article 13, to overcome the concern of those delegations which had difficulties with giving the Prosecutor broad powers.

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121. New Zealand supported article 12, with the word "may" rather than "shall". It supported article 13 as it stood and would wish to remove the square brackets around the first subparagraph (b) of article 6 in the "Further option for articles 6, 7, 10 and 11".

122. The proposal that the United Nations human rights machinery should be linked to the Court should be given further consideration.

123. Mr. MADANI (Saudi Arabia), referring to article 12, said that the Prosecutor should not be able to trigger action on his own initiative, but only in connection with a complaint by a State or the Security Council in cases within its competence. The phrase "from any source" and the references to intergovernmental organizations and victims should be deleted. A pre-trial chamber would have an important role to play.

124. Mr. WOUTERS (Belgium) said that his delegation was fully in favour of giving the Prosecutor the authority to initiate prosecution ex officio. The compromise solution in articles 12 and 13 provided an excellent working basis.

125. Mr. SCHEFFER (United States of America) said that his delegation was in favour of deleting references to *proprio motu* action by the Prosecutor, and recommended the deletion of articles 12 and 13 from the Statute.

126. His delegation remained unconvinced by the arguments put forward in favour of a *proprio motu* Prosecutor, and rejected the idea that the community of States was so lacking in moral and political courage that, when faced with an atrocity meriting the attention of the Court, not one State party would respond. It was wrong to argue that States' unwillingness to invoke the Court's jurisdiction was presumptively foreshadowed by the past reluctance of States to take on national prosecution of atrocities. On the contrary, the Court would provide an alternative to overcome the variety of legal, political, practical and resource difficulties which had made States reluctant, if not unable, to take on such prosecutions.

127. The argument that the State and Security Council referral approach would mean a politicized Prosecutor, while the *proprio motu* approach would ensure an impartial one, seemed simplistic. It would be naive to ignore the considerable political pressure that organizations and States would bring to bear on the Prosecutor in advocating that he or she should take on the causes which they championed. Both organizations and States might seek to act politically, but there was a significant difference in the accountability of States, as opposed to individuals and organizations.

128. The discussion had also ignored the extent to which State and Security Council referral had a political component that was beneficial, if not essential, to the work of the Prosecutor. In making referrals, States were expressing political will and political support for the Prosecutor and his work, and signalling to other States the level of their concern about the situation at issue and their commitment to support and assist the Prosecutor both directly and in his or her dealings with other States, including those likely to be hostile to the Prosecutor's investigation. That involvement of States was critical. Under the *proprio motu* model, it would become too easy for States parties to abdicate their responsibilities and leave it to individuals, organizations and the Prosecutor to initiate cases without the foundation of political will and commitment that only States could provide. The Prosecutor might then become isolated in a difficult international arena without the clear, continuing support of States parties. In addition, the argument that a *proprio motu* Prosecutor would be able to base a decision on whether to pursue investigations solely on legal criteria was not persuasive. If the Prosecutor had the authority, and responsibility, to pursue all credible allegations from individuals or organizations, there would surely be many more complaints than the Prosecutor could possibly handle. Many of those complaints might, on the face of it, meet the

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legal criteria for the initiation of an investigation, and the Prosecutor would not be able to use a simple legal checklist to choose which of several legally sufficient complaints to pursue, but would be required to make decisions of policy in addition to those of law.

129. Some prosecutorial discretion would be necessary and appropriate even in the context of a State referral regime. However, in the *proprio motu* setting, the exercise of prosecutorial discretion, which was not universally accepted, would become a frequent and essential step in preserving the proper functioning and focus of the Court. Considerably expanding the number of instances in which the Prosecutor might intervene was unlikely to result in good prosecutions, would undermine the perception of the Prosecutor's impartiality and would subject the Prosecutor to incessant criticism by groups and individuals who disagreed with his or her choices.

130. The *proprio motu* proposal thus risked routinely drawing the Prosecutor into making difficult public policy decisions which he or she was neither well equipped nor inclined to make. Such initial public policy decisions would be best made elsewhere, freeing the Prosecutor to deal for the most part with the law and the facts.

131. **Ms. CHATOOR** (Trinidad and Tobago) said that her delegation could in principle support the role of the Prosecutor in triggering the jurisdiction of the Court, and was flexible on the language in article 12. It was prepared to work with others on articles 12 and 13 in order to reach consensus. The checks and balances proposed in article 13 would provide a good basis for discussion.

132. The trigger mechanism should not be restricted to States parties only. That might not be in the interests of justice in the long run.

133. **Mr. GEVORGIAN** (Russian Federation) said that, if the Prosecutor was given direct power to initiate investigations, *proprio motu*, both the Prosecutor and the Court would become politicized.

134. **Mr. van BOVEN** (Netherlands) said that an ex officio role for the Prosecutor was essential if the Court was to be a viable institution. The Prosecutor should have the full use of all sources of information, from governmental and non-governmental sources as well as from victims' associations. As the representative of Ireland had said, victims must be given a voice. It was up to the Prosecutor to assess the pertinence and credibility of the information and his delegation was confident that the Prosecutor would act responsibly. On that basis, he or she would decide whether there were reasonable grounds for proceeding with an investigation.

135. His delegation also supported the idea of giving the Pre-Trial Chamber a role in exercising judicial review and authorizing the initiation of the investigation.

136. **Mr. STIGEN** (Norway) said that his delegation supported ex officio and *proprio motu* powers for the Prosecutor to trigger the Court's intervention. The exercise of those powers should be based on reliable information from any source. A qualified and independent Prosecutor would be the best insurance against politicized action by the Court, and should be able to deal with criticism in relation to the setting of priorities when there were many possible cases.

137. The Norwegian delegation nevertheless appreciated the doubts expressed by some delegations and believed that the proposed checks and balances, including the provisions regarding the Pre-Trial Chamber and the election of the Prosecutor and other rules, addressed those concerns. Norway supported the proposals of Germany and Argentina; it supported the principle of article 12, with the use of the word "may", and was happy with the wording of article 13.

The meeting rose at 1 p.m.

UNITED
NATIONS

United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

Rome, Italy
15 June-17 July 1998

Distr.
GENERAL

A/CONF.183/C.1/SR.10
20 November 1998

ORIGINAL: ENGLISH

COMMITTEE OF THE WHOLE

SUMMARY RECORD OF THE 10th MEETING

Held at the Headquarters of the Food and Agriculture Organization of the United Nations on Monday, 22 June 1998, at 3 p.m.

Chairman: Mr. P. KIRSCH (Canada)

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The meeting was called to order at 3.15 p.m.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (*continued*) (A/CONF.183/2/Add.1 and Corr.1; A/CONF.183/C.1/L.7)

Part 2 of the draft Statute (*continued*)

1. **Mr. POLITI** (Italy) said that Italy had always been in favour of giving the Prosecutor the authority to initiate investigations ex officio on the basis of information obtained from any source. His delegation supported the bracketed subparagraph (b) in the text for article 6 proposed in the "Further option for articles 6, 7, 10 and 11", as well as the text of article 12. In regard to the latter, it favoured the following formulation for the first sentence: "The Prosecutor may initiate investigations *proprio motu* or on the basis of information obtained from any source, in particular from Governments, United Nations organs and intergovernmental and non-governmental organizations." The second sentence would remain as drafted.

2. With regard to article 13, his preference was for an independent prosecutor who would not require specific authorization in order to initiate investigations. At the same time, he realized that a number of delegations were concerned that all possible guarantees should be provided against any improper use by the Prosecutor of the powers conferred on him or her, and could therefore accept the establishment of a mechanism of scrutiny on the basis of the proposals reflected in draft article 13.

3. **Mr. RWELAMIRA** (South Africa), speaking on behalf of the Southern African Development Community (SADC) and of his own delegation, said that he wished to associate himself with those who had spoken in favour of the inherent jurisdiction of the Court with regard to core crimes. The independence of the Prosecutor was critical to the effectiveness of the Court, and neither his delegation nor the SADC countries would like to see a situation in which the Prosecutor was dictated to either by individual States or by the Security Council.

4. Since the Prosecutor was a critical part of the trigger mechanism under the Statute, his or her role should be strengthened as much as possible, and he therefore supported the proposed article 6 in the "Further option for articles 6, 7, 10 and 11". Concerning article 12, he supported the view that the Prosecutor should be able to initiate investigations on the basis of information obtained from any source. In order to preserve the Prosecutor's independence, he would prefer the word "may" to be used in the article rather than the word "shall". In general, he would support removal of the brackets contained in the text.

5. Although his preference was for an independent prosecutor, he could accept the general content of the proposed article 13 in the light of the concerns expressed by others. Use of the Pre-Trial Chamber as a screening or filtering mechanism could allay some of the fears expressed, as well as providing a guarantee against unsubstantiated or frivolous complaints. However, he would like to have further discussion on the article before he took a firm position.

6. **Mr. BELLO** (Nigeria) said that the system of checks and balances which article 13 was intended to provide was inadequate. Under article 12, the Prosecutor was granted powers so enormous as to make that office a law unto itself. Moreover, those vast powers would invite complaints and ultimately make the Prosecutor ineffective. Nigeria therefore believed that articles 12 and 13, as well as the bracketed subparagraph (b) in article 6 in the "Further option for articles 6, 7, 10 and 11", should be deleted.

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7. **Mr. MANONGI** (United Republic of Tanzania) said it was very important that the Prosecutor be given an ex officio role if the universal regime of human rights protection was to be strengthened rather than weakened. His delegation could therefore accept that the Prosecutor be empowered to initiate investigations *proprio motu*.

8. However, he agreed with earlier speakers that the powers granted to the Prosecutor under article 12 needed to be qualified by the provisions proposed in draft article 13, whereby prior authorization by a pre-trial chamber would be required before an investigation could proceed.

9. **Ms. LI Yanduan** (China) said that her delegation did not agree that the Prosecutor should be given powers of investigation ex officio. It therefore proposed that article 6, paragraph 1 (c), as well as articles 12 and 13, should be deleted.

10. **Mr. VERGNE SABOIA** (Brazil) said that his delegation believed that the Prosecutor should be given powers to bring matters before the Court, and was therefore in favour of retaining article 6, paragraph 1 (c), or a similar wording. On the other hand, the Prosecutor should also be able to initiate investigations on the basis of information from a variety of sources, as indicated in article 12. Those powers should be subject to certain safeguards, and in that context he supported the system proposed in article 13, in particular regarding the role of the Pre-Trial Chamber. In his view, that issue was also related to the question of admissibility.

11. **Mr. SKIBSTED** (Denmark) said his delegation too believed that the Prosecutor should have powers of investigation ex officio. The text as drafted provided sufficient safeguards. The Prosecutor would have to decide that there was sufficient basis on which to proceed, and that evaluation would have to be approved by the Pre-Trial Chamber. The qualifications of the Prosecutor would have to be the same as those of the judges, and it was essential to ensure that the procedures for selecting members of the Court and for appointing the Prosecutor had the confidence of the world community.

12. The fact that the crimes to be tried by the Court were to be limited to the most serious offences should make it easier to agree on the prosecution of the offenders and allow the Court to become an effective instrument.

13. **Mr. IMBIKI** (Madagascar) said that if the Court was to be effective and credible it was important that the Prosecutor be made independent, and not subject to the authority of the Security Council. He or she would nevertheless not be immune from political pressures, which was why Madagascar agreed that any investigation launched should have the prior authorization of the Pre-Trial Chamber.

14. The Prosecutor would be required to initiate an investigation of a complaint brought by the Security Council or a State party; provision would have to be made to ensure that, should he or she refuse to act, the complainant could bring the matter to appeal.

15. **Mr. KAUL** (Germany) said Germany believed that in order to ensure the independence of the Prosecutor it was vital to give him or her the power to initiate investigations ex officio, since otherwise prosecutions could only be brought if a State party or the Security Council referred a situation to the Court. Giving the Prosecutor the power to act *proprio motu* would have the advantage of depoliticizing the process of initiating investigations.

16. Article 13 of the draft Statute reflected a proposal submitted jointly by Germany and Argentina. In response to the concerns expressed by a number of delegations, it would subject the Prosecutor to a form of judicial control when initiating investigations ex officio.

17. **Mr. SALAND** (Sweden) said his delegation did not wish the Court to be a mere tool of the Security Council; it should be truly effective, and the Prosecutor should be given an ex officio role. He fully supported the formula for judicial review contained in article 13, which would not only be a safeguard against frivolous complaints, but would also protect the Prosecutor from undue political pressure.

18. It was the duty of the Court at all stages of the proceedings to satisfy itself not only that it had jurisdiction in a particular case, but also that the case was admissible, and in that connection he agreed that lack of sufficient gravity should be a ground for inadmissibility.

19. **Ms. BLOKAR** (Slovenia) said that she supported the Prosecutor's right to trigger the Court mechanism and to initiate investigations ex officio. She therefore supported the bracketed subparagraph (b) of article 6 in the "Further option for articles 6, 7, 10 and 11".

20. She also supported article 12, with the deletion of the brackets around the words "and intergovernmental and non-governmental organizations", and the deletion of the last sentence. In response to those who had expressed the view that the Prosecutor should not have an ex officio or *proprio motu* role, she drew attention to article 43, paragraph 3, which stipulated that the Prosecutor was to be a person of high moral character, be highly competent and have extensive practical experience.

21. **Mr. KESSEL** (Canada) endorsed the views of those who favoured a prosecutor empowered to initiate proceedings ex officio based on information from all sources. Articles 12 and 13 provided sufficient safeguards in that respect, and he could not see how giving the Prosecutor the independence he or she needed could undermine the concept of complementarity.

22. **Ms. HERTZ** (Chile) said Chile had always believed that, if the Court was to be effective, the Prosecutor should be given powers to initiate investigations ex officio on the basis of reliable information. She could accept the wording proposed for article 6, and was in general agreement with the text of article 13, which should provide sufficient guarantees to satisfy both States parties and world opinion.

23. **Mr. Khalid Bin Ali Abdullah AL-KHALIFA** (Bahrain) said his delegation believed that the Prosecutor should not take action on his or her own initiative, and that the role he or she should play should be subject to clear limits. The sources of information used had to be limited too, so that information would be accurate and credible. The expression "any source" should be eliminated, as well as the mention of different sources. The Prosecutor's role should be subject to judicial control at all stages.

24. **Mr. MINOVES TRIQUELL** (Andorra) said that the Prosecutor's independent role was very important where heinous crimes were concerned. Articles 12 and 13 should be retained, as well as paragraph 1 (c) in article 6 (first version).

25. **Ms. DASKALOPOULOU-LIVADA** (Greece) said her delegation believed that the Prosecutor should be given powers to prosecute ex officio, since otherwise the bulk of the crimes which warranted international action would go uninvestigated and unpunished.

26. The precedent established by the ad hoc Tribunals for the former Yugoslavia and Rwanda militated in favour of such ex officio powers, and she accordingly favoured retention of article 6 (first version), paragraph 1 (c), or the bracketed subparagraph (b) of article 6 in the "Further option for articles 6, 7, 10 and 11". She also supported article 12, and could accept the idea embodied in article 13, provided that the Prosecutor was given the option of reintroducing a request if new evidence became available.

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27. **Ms. DIOP** (Senegal) supported the view expressed by earlier speakers that a strong, independent Prosecutor empowered to obtain information ex officio was crucial if the Court was to be effective. She therefore favoured the variant contained in article 6 (first version), paragraph 1 (c).

28. She could accept the text proposed for article 12, provided that an alternative was found for the expression "from any source" in the first sentence. Not all sources of information were equally credible. She fully supported article 13; prior authorization by a pre-trial chamber would act as a safeguard against any abuses on the part of the Prosecutor.

29. **Mr. DHANBRI** (Tunisia) said that his country had some misgivings as to the powers being granted to the Prosecutor in the draft proposed. His delegation believed that action should only be initiated on the basis of a complaint submitted by a State.

30. **Mr. KERMA** (Algeria) said that the role assigned to the Prosecutor in the draft text posed certain problems in regard to the principle of complementarity. His delegation was opposed to granting the Prosecutor powers to initiate investigations ex officio. Such investigations could in any case only proceed subject to the approval of the Pre-Trial Chamber, and he considered that article 12 should either be deleted or completely redrafted.

31. **Mr. GOULIYEV** (Azerbaijan) supported the functions for the Prosecutor defined in article 12, and favoured deletion of the brackets around "and intergovernmental and non-governmental organizations". The brackets in article 13 should also be deleted. The crime of aggression should be included in the list of crimes within the jurisdiction of the Court contained in article 5.

32. **Mr. Tae-hyun CHOI** (Republic of Korea) said his delegation agreed with previous speakers that the Prosecutor should have ex officio powers of investigation, with no restriction on sources of information. He endorsed the content of article 13, but considered that it should provide specifically for the possibility of a prosecutor abusing his or her powers.

33. **Mr. CAFLISCH** (Switzerland) said that his delegation attached great importance to the Prosecutor being empowered to obtain information ex officio as provided for in the bracketed subparagraph (b) of article 6 in the "Further option for articles 6, 7, 10 and 11", and in article 12. Switzerland also supported the concept of control by the Pre-Trial Chamber contained in article 13.

34. **Mr. AGBETOMEY** (Togo) said that if the Court was to be effective the Prosecutor should be enabled to play his or her role to the full, and to bring before the Court situations that had come to his or her attention by whatever means, provided that there was sufficient information on which to base the prosecution.

35. In order to dispel the concerns expressed, there should be a system of safeguards to prevent the Prosecutor from being subject to undesirable influences. The provisions of article 6 (first version), paragraph 1 (c), and of articles 12 and 13 should therefore be retained.

36. **Mr. DABOR** (Sierra Leone) said the Prosecutor should be empowered to initiate investigations *proprio motu* on the basis of information received from victims, intergovernmental organizations or non-governmental organizations. However, those powers should be subject to the safeguards provided for in article 13. In the first line of article 12, the word "may" should be used in preference to the word "shall"in order to give the Prosecutor discretion not to investigate frivolous complaints.

37. **Mr. GÜNEY** (Turkey) agreed with earlier speakers that to give an ex officio role to the Prosecutor would have adverse effects on the principle of complementarity. To extend the Prosecutor's powers unduly might lead to a deluge of complaints of a political nature which could reduce his or her effectiveness.

38. **Mr. MATSUDA** (Japan) said that allowing the Prosecutor to launch investigations ex officio would upset the balance between States parties and the Court by making the latter a kind of "supra-structure" with authority over States. In his view, complaints by States parties and referrals by the Security Council should adequately cover all serious crimes of international concern. If the Prosecutor was pressured into taking up a case by outside influences, the credibility of the Prosecutor and of the Court could be jeopardized.

39. **Mr. AL AWADI** (United Arab Emirates) agreed that to give the Prosecutor an ex officio role could be dangerous: the role of initiating action belonged solely to States. His delegation did not support article 12 and could not accept article 6 (first version), paragraph 1 (c).

40. **Mr. MAHMOOD** (Pakistan) supported that position. However, once a State had initiated proceedings, the Prosecutor should be given full independence in conducting the investigation.

41. **Mr. DA COSTA LOBO** (Portugal) considered that the effectiveness and credibility of the Court would depend on the Prosecutor having ex officio powers to initiate investigations.

42. **Mr. KAM** (Burkino Faso) said that he, too, favoured empowering the Prosecutor to initiate proceedings as provided for in article 6 (first version), paragraph 1 (c), and in article 12. That would enable an independent prosecutor with a purely judicial role to act in cases where States or the Security Council might block investigations because of the political interests at stake. The Prosecutor's powers should nevertheless be subject to control by the Pre-Trial Chamber.

43. **Ms. VEGA** (Peru) endorsed that view, and supported the joint proposal of Germany and Argentina contained in article 13.

44. **Mr. PEREZ OTERMIN** (Uruguay) considered that the risks of granting the Prosecutor ex officio competence were greater than the benefits, for the reasons already advanced by other speakers.

45. **Mr. HUARAKA** (Namibia) said that his country favoured an effective court and an independent prosecutor. It had been argued that a "rogue" prosecutor could emerge, but that was unlikely in view of the qualifications required for the office. It was important to have an effective, independent court, bearing in mind experience during the cold war. His delegation favoured retention of the relevant provisions of the draft.

46. **Ms. FRANKOWSKA** (Poland) supported articles 12 and 13.

47. **Ms. TASNEEM** (Bangladesh) said that, although the system of checks and balances provided by the provisions regarding the Pre-Trial Chamber offered some assurances against abuses by the Prosecutor, she was opposed to having so much power vested in a single individual. The composition of the Pre-Trial Chamber should be representative both in terms of equitable geographical distribution and in terms of the major international legal systems.

48. **The CHAIRMAN** invited comments on the role of the Security Council.

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49. **Mr. KOURULA** (Finland), acting as Coordinator, drew attention in particular to the two options given for article 10, paragraph 7. Under option 1, no prosecution could be commenced arising from a situation being dealt with by the Security Council, unless the latter decided otherwise. Under option 2, which reflected a Singapore/Canadian proposal, the Court could proceed with a prosecution after a period of time unless requested not to do so by a vote of the Security Council. There had also been proposals from the United Kingdom and Belgium.

50. **Mr. MOLNAR** (Hungary), referring to article 13, proposed that a mention of "intergovernmental organizations" should be added in the second sentence of paragraph 1.

51. In regard to the Security Council, his delegation supported the Singapore/Canadian proposal, possibly with the amendments proposed by the United Kingdom and Belgium.

52. **Mr. GONZALEZ GALVEZ** (Mexico) noted that the Conference was taking place at a time when the United Nations was discussing a number of proposals for reform of the Security Council; those discussions were relevant to the present debate. The Conference should not repeat the mistake made at San Francisco by tying the new Court to the organs of the United Nations, like the International Court of Justice. The Security Council would be one source of information for the Court regarding the existence of situations involving aggression, but not the only one. However, the Council, or rather the United Nations as a whole, would have a role in ensuring that the Court's decisions were implemented.

53. **Mr. LAHIRI** (India) said that the Court was an independent judicial body, not a political forum. The Security Council's powers and responsibilities were already provided for in the United Nations Charter, and could not be subtracted from or added to by the Court's Statute. If the intention was to add to the Security Council's powers through the Court, it must be borne in mind that the Court, unlike the Council, had no role whatsoever in the maintenance of international peace and security. Moreover, a large majority of United Nations Member States considered that the structure of the Security Council was unrepresentative.

54. It had been suggested that a Security Council referral should create a "green channel" in which the safeguards provided under articles 6, 7 and 9 could be dispensed with, but it should be pointed out that a single veto by one of the five veto-holding members of the Council would be sufficient to block such a referral. India was completely opposed to such a discriminatory arrangement.

55. **Ms. BLOKAR** (Slovenia) said that as she saw it the Security Council, as the main international organ responsible for international peace and security, should have the power to refer situations to the Prosecutor. That should eliminate the need for ad hoc tribunals. She therefore supported the second subparagraph (b) of article 6 in the "Further option for articles 6, 7, 10 and 11".

56. Consideration of a matter by the Security Council should not prevent the Court from acting since, whereas the functions of the Council were political, those of the Court, like those of the International Court of Justice, were purely judicial. As a compromise, her delegation could accept the provision contained in paragraph 1 of article 10 in the "Further option"; the second sentence of that paragraph was particularly important. She could go along with paragraph 2, despite doubts regarding the time-frame involved and the clause concerning renewal.

57. She supported the Belgian proposal regarding the preservation of evidence.

58. **Mr. SALAND** (Sweden) said that he had no problem with the second subparagraph (b) of article 6 in the "Further option", provided that the Security Council was acting under Chapter VII of the United Nations Charter. He could accept article 10 of the "Further option" if the wording in square brackets in paragraph 2 was retained.

59. **Mr. SHARIAT-BAGHERI** (Islamic Republic of Iran) recalled the recent statement adopted by the States members of the Non-Aligned Movement at Cartagena. The Security Council's responsibilities under the Charter should not limit the role of the Court as a judicial body. The Court should be empowered to pronounce on acts of aggression independently if the Council failed to perform its role within a certain period of time, and it should be able to decide on the responsibility of an individual for an act of aggression freely, without political influence.

60. **Mr. STIGEN** (Norway) supported Security Council referrals of "situations", as opposed to cases, to the Court, and welcomed the relevant provisions of articles 6 and 10 in the "Further option for articles 6, 7, 10 and 11". The formula in article 10, paragraph 2, was satisfactory, and the Belgian suggestion to include language providing for preservation of evidence in that connection (see document A/CONF.183/C.1/L.7) was attractive.

61. The Statute should include a reference to the power of the Security Council to create ad hoc tribunals. In general, he had no fear that a Security Council role would lead to political interference with the independence of the Court.

62. **Mr. NYASULU** (Malawi) said it was clear that the Security Council should be among those entities empowered to refer situations to the Court, thus obviating the need for the creation of ad hoc tribunals. That would not mean that the Council would have any control over the action taken by the Court. The second subparagraph (b) of article 6 in the "Further option" covered that notion and was to be preferred.

63. He supported the subsequent articles of the "Further option". Should those texts not be acceptable, however, the first versions of articles 6 and 10 would have to be considered. Paragraph 1 of article 10 might not be necessary if agreement was reached on the relevant provisions of article 6. Paragraphs 2 and 3 were procedural and seemed unnecessary. On the remainder of the article, a compromise was needed, but it should be recognized that there was no incompatibility between the role of the Security Council under Chapter VII of the Charter and the functions of the Court. For paragraph 7, he suggested wording to the effect that no prosecution could be commenced when the Security Council had so requested, that such a request was not to be interpreted as affecting the Court's independence, and that the Court could proceed if the Council took no action within a reasonable time.

64. **Mr. WOUTERS** (Belgium), introducing his delegation's proposal (A/CONF.183/C.1/L.7), said that Belgium favoured the texts for articles 6 and 10 contained in the "Further options for articles 6, 7, 10 and 11". The Belgian proposal was for an addition to paragraph 2 to take into account the risk that relevant evidence might disappear during the period in which investigation and prosecution were suspended. The Prosecutor would be authorized in such situations to take measures to preserve evidence.

65. **Mr. SADI** (Jordan) said that it was not clear to him why the Security Council should be singled out, in preference to other United Nations organs, as authorized to make referrals to the Court. Nor did he understand why the Council would need to request the suspension of an investigation for as long as 12 months. The Court should not become a mere appendage to the Council.

66. **Mr. KESSEL** (Canada) said he saw the role of the Security Council vis-à-vis the Court as a positive one, which would increase the Court's effectiveness and avoid the need for the continual creation of ad hoc tribunals to deal with specific situations. He agreed that there could be a time limit for the suspension of the Court's work,

but the role of the Security Council in stopping wars and thus saving lives must be taken into account. The draft contained sufficient safeguards to protect the Court's independence.

67. **Mr. TAÏB** (Morocco) feared that political decisions taken by the Security Council might unduly influence the Court's decisions or hinder its action. The Council's role should be limited to referrals of situations involving acts of aggression.

68. **Mr. DIAZ PANIAGUA** (Costa Rica) said it must be acknowledged that the Security Council had a responsibility under the Charter for the maintenance of international peace and security. To avoid conflict, the role of the Council must be coordinated with the role of the Court in such a way that the latter's independence was guaranteed. Referrals by the Council to the Prosecutor should only be made under Chapter VII of the Charter, and the square brackets in the second subparagraph (b) of article 6 in the "Further option for articles 6, 7, 10 and 11" should be deleted. He agreed with the representative of Jordan that a twelve-month period of suspension of an investigation was too long. In any event, a request for such a suspension should only be made following a formal resolution on the part of the Security Council. He fully supported the Belgian proposal.

69. He agreed with earlier speakers that the Charter did not give the Security Council a monopoly in determining that an act of aggression had been committed. That could be determined by the victim State, the General Assembly or the Court. He therefore could not support paragraph 1 of article 10 in the "Further option".

70. **Mr. KAUL** (Germany) supported the inclusion of the second subparagraph (b) of article 6 in the "Further option". He also supported article 10, including the material in square brackets in paragraph 2, and the addition proposed by Belgium (A/CONF.183/C.1/L.7).

71. **Mr. A. DOMINGOS** (Angola) said that, in the case of any conflict of competence, there was need to ensure objectivity and credibility, and that could be done through the mechanism of prior authorization by the Pre-Trial Chamber. Articles 12 and 13 offered a good basis for agreement in that respect.

72. **Mr. AL-JABRY** (Oman) said that, if article 12 was retained, he would like to see changes made in the text to curb the powers of the Prosecutor to initiate action ex officio. To ensure the Court's independence, the role of the Security Council should be limited to referrals in cases of aggression.

73. **Mr. ONWONGA** (Kenya) said he was prepared to consider proposals that would strike a balance between the independence of the Court on the one hand and the proper role of the Security Council on the other. The proposed article 10 in the "Further option for articles 6, 7, 10 and 11" would serve as a useful starting point in that regard.

74. **Mr. DA COSTA LOBO** (Portugal) felt that the Security Council had a role to play within the area of its security responsibilities. Article 10 in the "Further option", with the Belgian amendment, would satisfy his concerns.

75. **Mr. van BOVEN** (Netherlands), referring to the proposals in the "Further option", said that he approved the provision allowing referral of a situation by the Security Council, which would institutionalize an already existing practice with regard to the situation in the former Yugoslavia and Rwanda. Paragraph 2 of article 10 should be worded positively, to the effect that an investigation or prosecution could be commenced or proceeded with unless the Security Council had requested suspension. It was also unclear up to what point the Security Council could

intervene. It was essential to retain the reference to Chapter VII of the Charter. He fully supported the Belgian amendment.

76. Lastly, if the Conference decided to include the crime of aggression in the Statute of the Court, the role of the Security Council as defined in paragraph 1 of article 10 seemed to him essential.

77. **Ms. SHAHEN** (Libyan Arab Jamahiriya) supported the views expressed by Mexico and India. To give the Security Council, which was a political body, the right to trigger action would destroy confidence in the impartiality and independence of the Court, and thus detract from its credibility. Such an arrangement would enable the permanent Members of the Security Council to make the Court a tool for putting pressure on small, developing countries. Accordingly, her delegation considered that all references to the Security Council should be deleted from the draft Statute.

78. **Mr. SALINAS** (Chile) said he supported the provision allowing the Security Council, under Chapter VII of the Charter, to refer to the Prosecutor situations which constituted a threat to peace and security, provided it had adopted a resolution to that effect. However, the Security Council should not be authorized to refer to the Prosecutor situations under Chapter VI of the Charter, as provided for in draft article 10, paragraph 3.

79. The problem of how to reconcile the independence of the Court with the freedom of the Security Council to take action if faced with a political crisis or a threat to peace was a difficult and sensitive one. It would be necessary to try to ensure that the Security Council acted strictly in accordance with its mandate under the Charter.

80. **Mr. RODRIGUEZ CEDEÑO** (Venezuela) said that it was quite legitimate for the Security Council to submit to the Court situations related to matters that fell within its competence. However, his delegation could not support the proposed provisions that would allow the Council to impose conditions on the Court.

81. **Mr. JANDA** (Czech Republic) said that the Security Council should be able to bring situations to the attention of the Court, and that the Court should not be able to consider an act of aggression unless the Security Council had first determined that such an act had been committed. Regarding the suspension of proceedings, he could accept the wording of paragraph 2 of article 10 in the "Further option for articles 6, 7, 10 and 11", with the addition proposed by Belgium, provided that all brackets in the text were removed.

82. **Mr. BELLO** (Nigeria) said that the Court should be free of all outside influence; however, there was no escaping the fact that the Security Council had a role under Chapter VII of the Charter. He could accept the text of the second subparagraph (b) of article 6 in the "Further option for articles 6, 7, 10 and 11", without the square brackets.

83. However, the provisions proposed in article 10 in the "Further option" would be a travesty of justice. If the Security Council had jurisdiction to determine whether or not an act of aggression had been committed, the Court's hands would be tied, whatever was said about its independence not being affected. Moreover, how could aggression on the part of one of the permanent members of the Security Council be referred to the Court if that member could veto such a referral? If it was the Conference's aspiration to create a free, fair and independent Court, the proposed article 10 should be rejected.

84. **Ms. LI Ting** (China) said that her delegation could not accept the provisions allowing the Prosecutor to initiate action ex officio; article 6 (first version), paragraph 1 (c), should be deleted.

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85. It was essential that the Security Council be empowered to refer cases to the Court, since otherwise it might have to establish a succession of ad hoc tribunals in order to discharge its mandate under the Charter. The Security Council should also have the power to determine whether acts of aggression had been committed. The operations of the Court should not impede the Council in carrying out its important responsibilities for maintaining peace and security.

86. **Mr. SKIBSTED** (Denmark) said that the Security Council should be competent to refer situations to the Court, but should not interfere with its proceedings in any other way. The Council had exclusive responsibility for determining the existence of an act of aggression, but only the Court could decide whether the crime of aggression had been committed by an individual. The role given to the Council in the Statute meant that the crime of aggression must inevitably become one of the core crimes to be dealt with by the Court.

87. **Mr. VERGNE SABOIA** (Brazil) said that while he favoured an independent Court he believed there should be a functional relationship between it and other organs of the United Nations. He therefore supported the view that the Security Council should be empowered to refer situations to the Court, acting under Chapter VII and possibly also under Chapter VI of the Charter.

88. A decision by the Security Council to halt a prosecution by the Court should only be taken following a formal decision under Chapter VII and for a limited period of time. He therefore favoured either paragraph 7, option 2, in the first version of article 10, or the draft for article 10 in the "Further option for articles 6, 7, 10 and 11", provided that those two points were preserved. He supported the Belgian proposal (A/CONF.183/C.1/L.7).

89. **Ms. MEKHEMAR** (Egypt) urged that the Security Council's role should be kept within narrow limits to avoid politicizing the Court. The Council should be empowered to trigger the Court's action only when acting under Chapter VII of the Charter; the final decision would be taken by the Court. As she understood Article 39 of the Charter, the role of maintaining peace and security did not belong only to the Security Council, but also to other United Nations bodies, notably the General Assembly.

90. Concerning article 10, she rejected the idea that the Security Council should be permitted to impose restrictions on the Court. While the Council should have the right to deal initially with some matters, it should be empowered to prevent the Court from dealing with them only for a limited, non-renewable period.

91. **Ms. WONG** (New Zealand) supported the view that it needed to be made clear in the text that the Security Council could only prevent Court action by adopting a formal and specific resolution. With that clarification and the inclusion of a specific time limit, she could accept article 10 in the "Further option for articles 6, 7, 10 and 11".

92. **Mr. POLITI** (Italy) said that he, too, favoured enabling the Security Council to refer situations to the Court, to obviate the need for establishing new ad hoc tribunals whenever one or more of the core crimes appeared to have been committed. He preferred the formulation used in the second subparagraph (b) of article 6 in the "Further option". The text of article 10, paragraph 1, in that option was acceptable to his delegation.

93. The issue of the Security Council's power to block intervention by the Court was a delicate one, and it was important to provide guarantees that the Court's action would not be indefinitely impeded or gravely prejudiced. Any request for deferral of an investigation should be made only following a formal decision by the Council, and be confined to a specific period of time, with limited possibility of renewal. He, too, supported the Belgian proposal regarding the Prosecutor's right to take steps to preserve evidence.

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94. **Ms. PIBALCHON** (Thailand) said that Thailand had no objections to article 6 (first version), paragraph 1 (a), or to article 10, paragraph 1, in the "Further option". She supported the view expressed by New Zealand that suspension by the Security Council of the Court's proceedings should depend on a Council resolution.

95. **Ms. WILMSHURST** (United Kingdom) said that her delegation strongly supported enabling the Security Council to make referrals, but agreed that that should be under Chapter VII of the Charter, and that the square brackets in the second subparagraph (b) of article 6 in the "Further option" should be deleted. She was somewhat puzzled by the fears expressed by some delegations that such referrals would interfere with the independence of the Court simply because the Security Council was a political body: no one had accused the Security Council of interfering with the independence of the Tribunals for the former Yugoslavia and Rwanda, which had already been in operation for some time.

96. Concerning article 10 in the "Further option", she would favour removal of the brackets around "for a period of twelve months", in paragraph 2 but was not sure whether the reference to Chapter VII was appropriate, since the Council could be acting in accordance with its various responsibilities under the Charter.

97. **Mr. MATSUDA** (Japan) said that the relationship between the Security Council and the Court was a key issue. Since crimes within the Court's jurisdiction would be the most serious crimes of international concern, and since the Council was the principal organ responsible for maintaining international peace and security, it was right that the latter should have a role under the Statute. The Council should have the power to refer a situation to the Court, and in his view the consent of the parties concerned should not be required.

98. It would not be appropriate to totally prohibit the Court from exercising its functions with respect to a case simply because that case had already been taken up by the Security Council. In that regard, Japan basically supported the text in article 10 in the "Further option".

99. **Ms. DASKALOPOULOU-LIVADA** (Greece) said that she had no objection to the Council referring cases to the Court provided that it was acting under Chapter VII of the Charter. In regard to acts of aggression, she would favour the first two paragraphs of option 2 for paragraph 7 in the first version of article 10, including the reference to a time period and to the need for a format and specific decision by the Council. She could not support the proposed article 10 in the "Further option".

100. **Mr. DABOR** (Sierra Leone) said that he would have no objection to paragraph 1 of article 10 in the "Further option", but considered that the period of 12 months provided for in paragraph 2 was far too long: he proposed that the period be reduced to six months. He endorsed the Belgian proposal for preservation of evidence during such a period, and thought that witnesses, too, should be protected.

101. Further clarification was required concerning paragraph 2. The text as it stood would cover all crimes and not only the crime of aggression; it would be very dangerous, particularly if proceedings had already begun. There should also be a provision allowing a request for suspension of proceedings to be renewed once only.

102. **Mr. Tae-hyun CHOI** (Republic of Korea) said that his delegation could accept paragraphs 1, 2, 3, 5 and 6 of the first version of article 10. It favoured option 2 for paragraph 4, and option 2 for paragraph 7, without paragraph 2 of that option. In paragraph 3 of that option, the period of time in question should be specified.

The meeting rose at 6 p.m.

UNITED
NATIONS

United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

Distr.
GENERAL

A/CONF.183/C.1/SR.11
20 November 1998

ORIGINAL: ENGLISH

Rome, Italy
15 June-17 July 1998

COMMITTEE OF THE WHOLE

SUMMARY RECORD OF THE 11th MEETING

Held at the Headquarters of the Food and Agriculture Organization of the United Nations on Monday, 22 June 1998, at 7 p.m.

***Chairman*: Mr. IVAN (Romania) (Vice-Chairman)**

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The meeting was called to order at 7.10 p.m.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (*continued*) (A/CONF.183/2/Add.1; A/CONF.183/C.1/L.7)

Part 2 of the draft Statute (*continued*)

Jurisdiction (*continued*)

1. **Ms. DIOP** (Senegal), referring to the role of the Security Council in respect of the International Criminal Court, said that, in her delegation's view, no political structure should hamper the Court's action. The Court should be independent of the Council and any other political body. Regarding the Council's referral of matters to the Court, her delegation could accept the second subparagraph (b) of article 6 in the United Kingdom proposal ("Further option for articles 6, 7, 10 and 11" in document A/CONF.183/2/Add.1), with the deletion of the square brackets around the words "acting under Chapter VII of the Charter of the United Nations". With regard to article 10, the work of the Court should not be obstructed by the action of the Council. The former was a legal authority and the latter a political body, and they should perform their roles within their respective spheres. The inclusion of language pointing to the need for coordination between their activities might be considered, but otherwise Senegal favoured the deletion of article 10, whether in the original version or the United Kingdom version, and also of paragraph 3 of article 11 in the United Kingdom proposal.

2. **Ms. CHATOOR** (Trinidad and Tobago) said that, in her delegation's view, there had to be a relationship between the Security Council and the Court, particularly when the Council acted under Chapter VII of the Charter. However, only situations, and not individual cases, should be referred to the Court by the Council, and the latter's determination under Chapter VII of the Charter should be supported by a specific resolution. With regard to article 10 of the United Kingdom proposal, her delegation could go along with paragraph 1 if acts of aggression were included in the crimes within the Court's jurisdiction, but felt that the twelve-month period proposed in paragraph 2 was perhaps too long. Finally, Trinidad and Tobago could support the proposed amendment to provide for the preservation of evidence.

3. **Mr. GÜNEY** (Turkey) said that it was reasonable for the Security Council, as a body which had set up ad hoc tribunals, to be able to refer cases to the Court. However, where the Council acted pursuant to Chapter VII of the Charter, an appropriate balance needed to be established between it and the Court. The Turkish delegation considered the granting of full discretionary authority to the Prosecutor, whether ex officio or *proprio motu*, to be unacceptable, and favoured the deletion of article 6 (original version), paragraphs 1 (c) and 2, article 12 and article 13. Regarding the role of the Council, paragraph 2 of article 10 (United Kingdom proposal) could provide a basis for reaching a possible solution to the problem.

4. **Mr. KROKHMAL** (Ukraine) said that his delegation wished to emphasize that the Security Council was not the sole body responsible for the maintenance of international peace and security. Option 2 for paragraph 7 of article 10 (original version) and the United Kingdom proposal for article 10 were based on the idea that the determination of the facts regarding acts of aggression and of the prerequisites for the Court's exercising of its jurisdiction was the prerogative of the Council. Ukraine preferred option 1 for paragraphs 4 and 7 of article 10 (original version).

5. **Mr. JERMAN** (United Arab Emirates) said that interference of the Security Council, whose role was political, in the Court's activities could undermine the latter's independence and impede its work. There was a need to ensure that no contradiction arose between their respective roles. While it was admissible for a complaint to be lodged with the Prosecutor under Chapter VI of the Charter, careful thought should be given to the possibility of the Council's referral of such matters under Chapter VII. The Belgian and Singaporean proposals might serve to strike the necessary balance.

6. **Ms. VARGAS** (Colombia) said that her delegation felt that the Court's independence and impartiality should be clearly reflected in the Statute. While the Court should have an institutional relationship with the United Nations, none of the latter's bodies ought to have any influence over the Court or be able to obstruct its activities. Colombia viewed with concern those provisions of the draft which might enable the Council to thwart the jurisdiction of the Court. Despite the commendable efforts made to reach a compromise, it was necessary to seek further alternatives.

7. **Mr. YAÑEZ-BARNUEVO** (Spain) said that his delegation considered that the Statute should make provision for the Security Council to be able to refer situations to the Court whenever crimes specified in the Statute appeared to have been committed. That would enable the Council to avoid establishing ad hoc tribunals and would allow it to discharge its functions pursuant to Chapter VII of the Charter. Some delegations had mentioned the possibility of the referral of submissions to the Court by other United Nations bodies. That was acceptable to Spain, provided that they were principal, and not subsidiary, organs; any such referral would not have the same effect as a referral by the Council acting under Chapter VII of the Charter. His delegation agreed with the observations by the representative of Italy concerning the role of the Council with regard to the crime of aggression.

8. Concerning the issue of the suspension of proceedings at the request of the Council, the provision contained in article 23, paragraph 3, of the original draft Statute prepared by the International Law Commission had the effect of requiring the Court to seek the Council's permission to engage in proceedings relating to matters already under consideration by the Council, with the possibility of a veto by one of its members. That was totally unacceptable. The compromise submitted by Singapore and amended by Canada, involving a request for a temporary suspension of proceedings, could, together with a number of safeguards, be envisaged. Neither the wording of paragraph 6 of article 10 (original version) nor that of paragraph 2 of the United Kingdom proposal for article 10 (in the "Further option for articles 6, 7, 10 and 11") was entirely satisfactory. The text should be couched in positive terms, as proposed by the Netherlands. The request should be made formally, in a way that enabled the Council to exercise its authority pursuant to the Charter, and a formal decision on the request should be taken by the Court after it had heard the views of the Prosecutor and interested States. An extension of the suspension should be allowable but subject to a time limit. The Court should take all appropriate measures for the preservation of evidence and any other precautionary measures in the interests of justice. For the sake of clarity, the various issues might be set out in separate provisions.

9. **Mr. GEVORGIAN** (Russian Federation) said that, in his delegation's view, the triggering role should be an unconditional right of the Security Council. With regard to paragraph 2 of the United Kingdom proposal for article 10, the Russian Federation did not believe that it was possible in principle for the provisions of the Charter to be amended by any other international instrument; those provisions would override any others. Extreme caution was therefore called for in the drafting of the Statute. His delegation did not see any conflict between the "political" role of the Council and the activities of the Court. The Council was intended to have a political impact on States and the Court would be playing an essential role in the maintenance of peace and security.

10. **Mr. CHUKRI** (Syrian Arab Republic) said that, under article 10, paragraph 1, of the United Kingdom proposal, the Court would be unable to exercise jurisdiction with respect to a crime of aggression unless the Security Council had first determined that a State had committed such an act. In over 200 cases dealt with by it, the Council had avoided making such a determination. It had become a club of superpowers, whose right of veto could protect thousands of international criminals by blocking the Court's procedures. Therefore, in order to have a court that would deal with all who committed international crimes, his delegation was against assigning any role to the Security Council.

11. **Mr. MORSHED** (Bangladesh) said that he did not believe the dichotomy between the political and legal roles to be valid. When the Security Council acted under Article 39 of the Charter in cases involving the crime of aggression, its determination was the legal characterization of a situation. No court could escape the binding effect of such a determination. His delegation wished to reserve its position concerning the Council's role with regard to other crimes, particularly war crimes and those involving weapons of mass destruction, where the prevailing regime was so discriminatory that situations of considerable instability could arise.

12. **Mr. SEREKOISSE-SAMBA** (Central African Republic) said that the Security Council should not be denied the right to refer matters to the Court. The provision in article 10, paragraph 2, of the United Kingdom proposal ("Further option for articles 6, 7, 10 and 11") granting the Council power to suspend proceedings reflected a commendable desire to harmonize the actions of those two bodies; however, harmonization did not mean obstruction. Bearing in mind the operation of the statute of limitations under article 27, his delegation felt that paragraph 2 should be reworded so that the Council's right of suspension could not be renewed indefinitely.

13. **Mr. ROGOV** (Kazakhstan) said that the role of the Security Council should be limited to the initiation of cases or proceedings, whereupon the Court should be able to act independently. Perhaps the Council could be empowered to request the Court to suspend its consideration of a case, without the Court's decision on that request being prejudged. However, the Council's role in such an important issue as the determination of acts of aggression should not be disregarded. It might be true that the Council was not adapted to present-day circumstances and that the Charter should be amended accordingly, but for the time being the Council's role must be recognized.

14. **Mr. MANSOUR** (Tunisia) said that it was important to emphasize both the role played by the Security Council in the maintenance of international peace and security and the distinction between the political role of the Council and the legal role of the Court. The Council should be allowed to perform its role in accordance with Chapter VII of the Charter.

15. **Mr. ROWE** (Australia) said that Australia favoured the granting of power to the Security Council to refer situations to the Court when acting under Chapter VII of the Charter. It thus supported article 6, paragraph 1 (a), and article 10, paragraph 1 (original version). It also supported article 6 (b) of the United Kingdom proposal. If acts of aggression were included in the crimes within the Court's jurisdiction, Australia would support the proposal that no action by the Court be allowed to proceed without an appropriate determination by the Council under Article 39 of the Charter. In that regard, his delegation favoured option 1 for article 10 (original version), paragraph 4. Concerning the balance to be struck between the independence of the Court and the powers of the Council in matters being dealt with by the Council, his delegation believed that option 2 for article 10, the proposal by Singapore and Canada, in conjunction with article 10, paragraph 2, of the further option, represented the best approach for finding an acceptable solution.

16. **Mr. SCHEFFER** (United States of America) said that, in his delegation's view, it was important for the Security Council to refer situations to the Court under both Chapters VI and VII of the Charter. Consideration

needed to be given to the different consequences arising from a referral under those two authorities. It might be necessary to examine exactly how to word article 10, paragraph 2, of the United Kingdom proposal. The United States delegation believed that a formal resolution by the Council was required with respect both to referrals and to the Council's actions as described in that paragraph 2, and that any action under that paragraph did not have to be exclusively action by the Security Council pursuant to Chapter VII. The Belgian proposal (A/CONF.183/C.1/L.7), although interesting, was vague and would require further discussion.

17. **Mr. MAHMOOD** (Pakistan) said that all decisions of the Security Council, which was a political organ of the United Nations, were based on political considerations rather than legal principles. Pakistan found it difficult to accept that such political considerations should be infused into the functioning of the Court, and therefore shared the view that the Council should not have a role in the Court.

Articles 14 to 19 (admissibility)

18. **Mr. HOLMES** (Canada), Coordinator, introducing articles 14 to 19, said that article 14 might be unnecessary in view of the similar text in paragraph 1 of article 17. He understood that most delegations felt that article 14 could be deleted, subject perhaps to clarification in article 17.

19. Article 15, entitled "Issues of admissibility", was the result of extensive discussions in the Preparatory Committee concerning the principle of complementarity. In those discussions, virtually all States had indicated the importance which they attached to the inclusion of the principle of complementarity in the Statute—the principle that the primary obligation for the prosecution of crimes falling within the jurisdiction of the Court lay with States themselves. Also, most delegations had been of the view that, when States were unable or unwilling to fulfil that obligation, the Court should have jurisdiction to intervene. The idea was not that the Court should serve as an appellate body or a court of last resort for national legal systems. Where States assumed their obligations, the Court had no role; only where there was a failure due to inability or unwillingness was the Court engaged. Paragraph 1 of the article set out the basic approach, namely that the Court would determine that a case was inadmissible if it was being investigated or prosecuted by a State, or had been investigated and a decision not to proceed had been taken by the State, or the person concerned had already been tried, or the case was not of sufficient gravity. Subparagraphs (a) and (b) contained the exceptions where the Court could declare a case admissible, i.e. if the State was unwilling or unable to carry out the investigation or its decision not to prosecute was based on its unwillingness or inability to prosecute. The terms "unwillingness" and "inability" were defined in paragraphs 2 and 3 respectively. The draft in document A/CONF.183/2/Add.1 contained a number of footnotes indicating areas that might require adjustment depending on the outcome of discussions on other articles or parts of the draft Statute.

20. Article 16, relating to preliminary rulings regarding inadmissibility, had been proposed by the United States delegation, which had indicated that its proposal was not intended to reopen issues already agreed upon with regard to article 15, but related to different procedures affecting admissibility.

21. Article 17 dealt essentially with the procedural aspects of challenges to the jurisdiction of the Court or to the admissibility of a case. While agreement had been reached on most of its provisions in earlier discussions, some delegations had indicated that their final position would depend on the ultimate wording of article 15. Paragraph 1 set out the obligation of the Court to satisfy itself at all stages of the proceedings as to its jurisdiction over a case and the possibility for the Court to determine the admissibility of the case pursuant to article 15. The question of who had the right to challenge the admissibility of a case or the jurisdiction of the Court was dealt with in paragraph 2. All delegations had agreed that individuals, States and the Prosecutor should have that right. With regard to individuals, there was a link between paragraph 2 (a) and the question being dealt with by the Working

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Group on Procedural Matters regarding an agreed definition of suspects. Concerning States, some delegations had argued that only States referred to in article 15 should be granted the possibility of making challenges, while other delegations had favoured wider definitions, as reflected in the bracketed subparagraphs following subparagraph (b) of paragraph 2. There had been consensus on the right of the Prosecutor to seek a ruling from the Court regarding issues of jurisdiction or admissibility. Paragraph 2 also provided for the possibility for other interested States to submit observations to the Court during its proceedings on admissibility or jurisdiction, and there had been agreement that victims, while not able to make a challenge, should also be entitled to make observations. The following two paragraphs described the modalities of such challenges and had been adopted by the Preparatory Committee without any square brackets, paragraph 3 stating that challenges could be made only once by any person or State prior to or at the commencement of the trial, and paragraph 4 stipulating that challenges must be made at the earliest opportunity, thereby ensuring that those procedures would not be used for purposes of delay or obstruction. However, in order to introduce flexibility for exceptional circumstances, it had been accepted that the Court itself could grant leave for a challenge to be brought more than once. Paragraph 5 dealt with the organ of the Court that would be competent to decide on issues of admissibility or jurisdiction. There had been general agreement that such matters should be referred to the Pre-Trial Chamber during the pre-trial stage and to the Trial Chamber after the charges had been confirmed. Paragraph 6, which had been deemed essential by a number of delegations, allowed the Prosecutor to request the Court to review a decision of inadmissibility if conditions required under article 15 were no longer met. However, the view had also been expressed that such a review procedure gave the Prosecutor too wide a power of appreciation over national proceedings.

22. Article 18, relating to the principle of *ne bis in idem*, was closely linked to article 15. The exceptions to paragraph 1 set out in paragraph 3 were closely linked to the criteria laid down in subparagraphs (a) and (c) of paragraph 1 of article 15. The footnotes to article 18 in document A/CONF.183/2/Add.1 related primarily to drafting, but footnote 59 dealt with the possible need for additional exceptions and reflected the view of a few delegations.

23. Article 19 was untitled. In the discussions of the Preparatory Committee on article 18, it had been proposed that, even if a person had already been convicted, the Court should be able to try the case if a manifestly unfounded subsequent decision by the national authorities resulted in the suspension or termination of a sentence. There had been insufficient time for delegations to agree that such a provision be included and, if so, on where it should be placed.

24. **Ms. MEKHEMAR** (Egypt) said that her delegation had reservations regarding the deletion of article 14. It was still examining articles 15 and 18.

25. **Mr. SCHEFFER** (United States of America) said that he would like to introduce article 16. While his delegation supported the text of article 15 on issues of admissibility, it had proposed article 16 after it had become clear in the discussions of the Preparatory Committee that there was growing support for the concept of referrals of overall situations to the Court by the Security Council, a State party, or the Prosecutor acting *proprio motu*. In line with the principle of complementarity, it would then seem necessary to provide for a procedure, at the outset of a referral, which would recognize the ability of national judicial systems to investigate and prosecute the crimes concerned. Under the proposed article, the Prosecutor would be able to proceed immediately to conduct an independent investigation if, in the face of a challenge by a national judicial system, the Prosecutor could persuade the judge to allow him to do so. That did not contravene the principle set out in article 17, paragraph 3, whereby a person or State could challenge admissibility only once concerning an individual case relating to an individual suspect. The United States proposal concerned an overall matter referred to the Court at an earlier stage, when no particular suspects had been identified, and a State's right to launch full-scale investigations. Further consultations

on the precise text would be useful. On the question of the preservation of evidence, consideration needed to be given to that not only in the context of the early stage of investigations dealt with in article 16 but also in the Committee's discussion of article 54 and other discussions concerned with the Prosecutor's right of investigation. In addition, it would be desirable to ensure that, at the initiative of the Prosecutor, the Court took account of any radical change in the circumstances in a country while its judicial system was conducting an investigation.

26. Copies of the statement of explanation on article 16 which had originally been submitted by his delegation to the Preparatory Committee would be made available to delegations present.

27. **Mr. GONZALEZ GALVEZ** (Mexico) said that the way in which the principle of complementarity was formulated was important. If it could not be based on the consent of States, there needed to be exceptions to national jurisdiction and safeguards to prevent interference with the sovereignty of States. His delegation would comment on article 15 when the proposed amendments which it had submitted in writing to the Secretariat had been distributed. Mexico felt that article 14 was unnecessary and could be deleted. Article 16 provided a sound basis for further examination. It was an important text, which supplemented the guarantees which the Statute aimed to provide.

28. **Mr. CORTHOUT** (Belgium) said that his delegation supported the deletion of article 14, which was redundant. It agreed in principle with article 15. Article 16 would add new obstacles to the exercise of the Court's jurisdiction; Belgium was therefore in favour of its deletion. Regarding article 17, challenges to the admissibility of a case should be possible only for an accused or for a State party which had jurisdiction over the crime on the ground that it was investigating or prosecuting the case or had investigated or prosecuted the case; also, his delegation favoured the inclusion of the proposed paragraph 6. The rule *ne bis in idem* was a fundamental principle of criminal procedural law and should apply in the two ways covered in paragraphs 1 and 2 of article 18, but should not be used to conceal situations or prevent the Court from exercising its jurisdiction in cases where an accused was the subject of a fake trial at the national level. Belgium therefore strongly supported the exceptions provided for in paragraph 3. Article 19, originally co-sponsored by Belgium, was intended to deal with situations where a person had been convicted at the national level but where the sentence was subsequently rendered ineffective through a manifestly unfounded decision on the suspension of its enforcement, or through a pardon, parole or commutation. If that measure prevented the application of an appropriate penalty, the Court should be empowered to exercise jurisdiction over the person concerned.

29. **Mr. SALINAS** (Chile) said that his delegation considered that article 14 was unnecessary and should be deleted. Regarding article 15, there was a need to explain more clearly the vague reference in paragraph 1 (d) to sufficient gravity in regard to the justification of the Court's further action. Chile considered a revision of the formulation of article 16 to be necessary, but would reserve its comments until it had examined the explanatory paper referred to by the representative of the United States of America. Finally, it fully supported the text of article 16, in particular the provisions of its third paragraph.

30. **Ms. ASSUNÇÃO** (Portugal) said that her delegation accepted the negotiated text of article 15 and did not wish to reopen the discussion on it. Concerning article 17, it preferred the wording "an accused or a suspect" in paragraph 2 (a), favoured the term "State Party" in paragraph 2 (b) and supported paragraph 6. It agreed in principle to the text of article 18. Portugal, which had been a co-sponsor of article 19, believed that the limitations on the principle *ne bis in idem* should be confined to exceptional cases but that the cases specified in article 19 were necessary.

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31. **Mr. SCHEFFER** (United States of America) said that, in his delegation's view, article 14 could be deleted provided that the principle which was contained in it remained in article 17. The text of article 15, as currently drafted, was acceptable. Regarding article 17, paragraph 1 would need to be retained; in paragraph 2 (a), the only individual allowed to make challenges should be an accused, since allowing a suspect to do so would complicate the Court's procedures; in paragraph 2 (b), the challenge should be permissible by any State which met the criteria set forth in that subparagraph, as it would be inconsistent with the principle of complementarity not to recognize the interests of States that were not parties; and paragraph 6 required further discussion to ensure that its provisions were not abused. The text of article 18 had been carefully formulated in previous discussions and should as far as possible remain intact. His delegation was still studying the proposed article 19.

32. **Mr. KELLMAN** (El Salvador) said that his delegation wished to stress that the application of the exceptions set out in article 18, paragraph 3 (a) and (b), and in article 19 was linked to the principle of complementarity. Certain positions adopted appeared to suggest a different interpretation of those provisions.

33. **Mr. BAZEL** (Afghanistan) said that his delegation believed that article 15 should additionally address the issue of admissibility in cases involving amnesties and should include a new paragraph providing for the inadmissibility of cases where there was a temporary interruption of a State's judicial system owing to civil strife. With regard to article 16, it preferred a one-year period in the last sentence of paragraph 2, and wished to suggest that the word "report" be replaced by "inform" in paragraph 4. The Afghan delegation believed that it was the sovereign right of States to decide on the commutation of a sentence or on a pardon, according to its national interests and crime policy, and therefore proposed the deletion of article 19.

34. **Ms. WILMSHURST** (United Kingdom) said that her delegation agreed to the deletion of article 14. It found article 15 acceptable. While sympathetic to the idea behind article 16, it had serious problems with the text as currently drafted, but was willing to consider any proposed changes. Regarding article 17, the United Kingdom delegation favoured "accused" in paragraph 2 (a); in paragraph 2 (b), it strongly supported the reference to "a State" since, if a State that was not a party was carrying out an effective prosecution in its own territory, there was no reason for the Court to intervene and also conduct a prosecution. Concerning article 19, while her delegation understood the reasons behind the proposed text, it was unsure whether it would be possible to reach agreement on it in view of the highly sensitive and difficult issues which it raised.

35. **Ms. DIOP** (Senegal) said that her delegation agreed that article 14 could be deleted. Article 15, which appeared to have broad support, was acceptable. Senegal had initially intended to request the deletion of article 16, but would re-examine the text in the light of the suggested changes. Concerning article 17, the phrase in square brackets should be deleted in paragraph 2 (a), and the reference to "a State Party" was preferable in paragraph 2 (b), since States parties would have obligations following ratification and the conduct of investigations and prosecutions would thus be facilitated. The text of article 17, paragraph 6, was acceptable, as was that of article 18, possibly with a few modifications.

36. **Mr. SKILLEN** (Australia) said that his delegation agreed to the wording of article 15 but not with the alternative approach described at the end of that article. It favoured the deletion of article 16, but would reserve its position pending additional clarifications. Australia agreed with the remarks made by the representative of the United Kingdom concerning article 17, paragraph 2 (b), to the effect that non-parties should also have the right to make challenges, and it supported the inclusion of paragraph 6 in that article. It generally agreed with the provisions of article 18 but disagreed with the "alternative approach" set out at the end of that article. Regarding article 19, his delegation sympathized with the proposal but would suggest that it should be dropped if most delegations felt that its negotiation would unduly delay the work.

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37. **Mr. GÜNEY** (Turkey) said that, in his delegation's view, article 14 could be deleted provided that the principle laid down in it was reflected elsewhere in the Statute. Articles 15 and 16 could be left aside pending further proposals. Article 17 was acceptable. Article 18, which dealt with one of the basic principles of criminal law, was closely linked to article 15 and needed to be brought into line with article 5 once a decision had been reached on it. With regard to article 19, Turkey agreed with the view expressed by the United Kingdom delegation.

38. **Mr. SYQUIA** (Philippines) said that his delegation had no objection to the deletion of article 14, which appeared to be redundant. Article 15 was acceptable. The support of the Philippines for article 16 would be subject to the information to be provided by the United States delegation. With regard to article 17, the phrase "an accused" was preferred in paragraph 2 (a), since there was no point in a suspect's being able to question admissibility; in paragraph 2 (b), the use of the term "State Party" was favoured; it would open up a two-way relationship between the Court and States parties whereas to allow States not parties to challenge admissibility would involve a one-way relationship, because the Court could not determine whether such States observed the principles laid down in the Statute. There were no objections to the text of article 18, or to that of article 19 provided that it did not include amnesty.

39. **Mr. ZIMMERMANN** (Germany) said that his delegation agreed to the deletion of article 14. Article 15 represented a carefully drafted compromise which should stand as presently worded. Concerning article 16, Germany wished to reserve its position until it had seen the written details to be provided by the United States delegation. With regard to article 17, only the accused and any State which had jurisdiction over the crime on the ground that it was investigating or prosecuting the case, or had investigated or prosecuted the case, should be able to challenge the jurisdiction of the Court; also, paragraph 6 of that article should be retained. Finally, the text of article 18 should remain as it stood.

40. **Ms. LEHTO** (Finland) said that, in her delegation's view, article 14 should be deleted. Article 15 was the result of extensive discussions and represented a good compromise; it should be retained as currently drafted. Footnote 42 to that article could be disregarded, since articles 18 and 19 dealt with the matters referred to in it. While appreciative of the presentation made by the representative of the United States on article 16, her delegation was still unconvinced of the need for such a procedure, but might wish to comment on the details subsequently. Concerning article 17, Finland's preference was for the deletion of the text in square brackets in paragraph 2 (a), the use of the words "A State Party" in the first line of paragraph 2 (b) and the deletion of the two bracketed subparagraphs following paragraph 2 (b). Paragraph 6 should be retained. Her delegation supported article 18, in its present form, and article 19, but was flexible with regard to its drafting.

41. **Ms. VARGAS** (Colombia) said that her delegation agreed to the deletion of article 14 provided that the principle involved was reflected in article 17. It wished to see the Mexican proposals before taking a decision on article 15 and would examine the information to be submitted by the United States delegation before adopting a position on article 16. Regarding article 19, Colombia agreed with the United Kingdom that major difficulties would be entailed in its negotiation and that it would thus be preferable to delete the article.

42. **Mr. NATHAN** (Israel) said that his delegation favoured the deletion of article 14. Article 15 should be retained as currently worded. Article 16 would be given further consideration once the additional details had been made available by the United States delegation. With regard to article 17, in paragraph 2 (a) the words "or a suspect" should be retained; in paragraph 2 (b), the right of challenge should be conferred on all States and not solely on States parties; and paragraph 6 should be retained as presently drafted. While fully in agreement with the principle set out in article 18, his delegation felt that the wording of paragraph 3 (b) should perhaps be looked at since the concept seemed to overlap partly with that in paragraph 3 (a). Israel had a problem with article 19, since

it might imply unwarranted interference with decisions of administrative organs of a State which had already tried a person for crimes covered by the Statute.

43. **Mr. YEPEZ MARTINEZ** (Venezuela) said that his delegation considered article 14 to be unnecessary since its substance appeared elsewhere in the Statute. While it would study the amendments to be submitted by the delegation of Mexico, it would prefer article 15 to remain unchanged, as its text represented a harmonious balance arrived at during earlier consultations. Concerning article 16, Venezuela would await the paper to be provided by the United States delegation, but did not feel that such an article was necessary. With regard to article 17, the text of paragraph 1, dealing with the responsibility of the Court to satisfy itself as to its jurisdiction, should form a separate article; in paragraph 2 (a), reference to "an accused" only was preferable; and, in paragraph 2 (b), only States parties should be able to make challenges. Article 19 did not add clarity and should be deleted.

44. **Mr. SACIRBEGOVIC** (Bosnia and Herzegovina) said that his delegation felt that the "alternative approach" referred to in document A/CONF.183/2/Add.1 following article 15 and also following article 18 might be used to provide immunity from prosecution. In the situation prevailing in his region, a defence frequently employed in cases where persons were indicted was that they were being brought to trial by a national court, when that was not in fact true.

45. It had been asked why the Court should have jurisdiction over a matter being effectively handled by a national court, but he wished to point out that the main reason why the International Criminal Tribunal for the Former Yugoslavia, for example, had been set up was not because prosecution by local courts would have been ineffective but because the crimes involved were of such a nature that they demanded international attention.

46. **Ms. WYROZUMSKA** (Poland) said that, in her delegation's view, article 14 was redundant. The compromise text of article 15 had been achieved through long negotiations and should remain as it stood. Article 16 would create further obstacles to the Court's jurisdiction and should be deleted. With regard to article 17, Poland believed that, under paragraph 2, it should be possible for challenges to be made by an accused or by the State which had jurisdiction over the crime, and that the Prosecutor should be empowered to seek a ruling from the Court regarding a question of jurisdiction or admissibility; also, paragraph 6 should be retained. The wording of article 18 was acceptable. Poland shared the view that article 19 required further discussion and could pose problems, given the sensitivity of the issue; it would be preferable to delete it.

47. **Ms. LE FRAPER DU HELLEN** (France) said that her delegation would prefer to retain article 14 but could agree to its deletion if the principle it contained was reflected in article 17. The text of article 17, paragraph 1, might need redrafting; the Court should satisfy itself as to its jurisdiction as soon as a case was referred to it. The text of article 15 was well balanced and could be accepted. With regard to article 16, paragraph 1 was acceptable, but the point seemed already to be covered elsewhere in the Statute. Her delegation would revert to article 16 when more information was made available. Regarding article 17, it would be preferable to retain the reference to both an accused and a suspect; in paragraph 2 (b), the possibility of making challenges should not be available to States not parties; and paragraph 6, as currently worded, was acceptable. The text of article 18 could be accepted as it stood. Article 19 constituted an interesting proposal, but it would be very difficult to introduce such a sensitive provision into the Statute.

48. **Mr. MANSOUR** (Tunisia) said that his delegation had no objection to the articles on admissibility, but had questions regarding what would happen when certain individuals were prevented from being brought before the Court, and what standards would be applied by the Court in determining issues of admissibility under article 15. Also, the question of appeals was not mentioned in that article.

The meeting rose at 9.40 p.m.

UNITED
NATIONS

United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

Rome, Italy
15 June-17 July 1998

Distr.
GENERAL

A/CONF.183/C.1/SR.12
20 November 1998

ORIGINAL: ENGLISH

COMMITTEE OF THE WHOLE

SUMMARY RECORD OF THE 12th MEETING

Held at the Headquarters of the Food and Agriculture Organization of the United Nations
on Tuesday, 23 June 1998, at 10 a.m.

Chairman: Mr. P. KIRSCH (Canada)

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V.98-57465 (E)
99-81000 (E)

The meeting was called to order at 10.20 a.m.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT, IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (*continued*) (A/CONF.183/2/Add.1 and Corr.1; A/CONF.183/C.1/L.9 and L.14)

Part 2 of the draft Statute (continued)

Articles 14 to 19 (admissibility) (continued)

1. **Mr. ABDELKADER MAHMUD** (Iraq) said that he was in favour of the "alternative approach" set out at the end of article 15, the view of his delegation being that complementarity between the Court and national jurisdictions implied mutual respect and trust. He had no problem with paragraph 1 of article 16 and the first part of paragraph 2, but considered that paragraphs 3, 4 and 5 should be deleted. Iraq could accept paragraph 1 of article 17 subject to its comments regarding article 15, and could accept paragraph 2 apart from the second bracketed subparagraph following subparagraph (b). The expression "State Party" should be used rather than the expression "State". His delegation favoured the "alternative approach" for article 18. It would propose that article 19 be deleted since it gave rise to a number of complicated problems, notably in relation to the sovereignty of States. Lastly, in respect to article 20, concerning applicable law, he considered that paragraph 1 (b) was unnecessary and could be deleted, and he favoured option 2 for paragraph 1 (c).

2. **Mr. NAGAMINE** (Japan) supported the formulation proposed for article 15, and considered that article 16 should be retained, since the principle of complementarity should be applied even in the early stages of an investigation. Article 17 was a very important one, and he fully supported the view that the right of challenge provided for in paragraph 2 should not be limited to States parties. He did not favour inclusion of paragraph 6. While his delegation could basically support the wording of article 18, it would propose that the words "for the same conduct" be added in paragraph 3 after "shall be tried by the Court", for the sake of clarity. He fully understood the idea behind the proposal for article 19, but felt that it should be addressed with the utmost care since sensitive issues of national policy were involved.

3. **Ms. CUETO** (Cuba) said that although the draft text of article 15 could be a good basis for compromise, it tended to place too much emphasis on evaluating the conduct of national courts, and she supported the proposals of Mexico in document A/CONF.183/C.1/L.14 in that regard. Concerning article 16, Cuba was concerned to preserve the principle that States should have the right to appeal against the initial decisions of the Court. In article 17, the term "accused" should be used and the word "suspect" deleted. She favoured the expression "a State" rather than "a State Party". Her delegation could accept the deletion of article 14 on the understanding that its contents were reflected in article 17. Article 18 appeared to contain an excessive number of exceptions to the *ne bis in idem* principle, and she considered that the "alternative approach" described at the end of the article was preferable.

4. **Mr. GONZALEZ GALVEZ** (Mexico), introducing his delegation's proposals (A/CONF.183/C.1/L.14), noted that they contained a proposal for a new article 12 *bis* and proposed amendments to articles 102 and 108 as well as to article 15. Concerning the suggestions made in regard to article 15, he noted that, as pointed out in document A/CONF.183/2/Add.1, the draft given there was not an agreed text. His delegation's proposals were aimed at facilitating agreement. If they were adopted, a related change would be appropriate in article 18, paragraph 3 (b).

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5. **Mr. EFFENDI** (Indonesia) said he was flexible on articles 14, 16, 17 and 20. He preferred the "alternative approaches" suggested for articles 15 and 18, because they were in line with the principle of complementarity, and proposed that article 19 be deleted.

6. **Mr. KADDAH** (Syrian Arab Republic) said his delegation too preferred the "alternative approaches", which embodied the idea of complementarity. The Court should not have jurisdiction in cases that were being investigated or had been dealt with by a State. The amendments submitted by Mexico were helpful in clarifying the proposed exceptions to that rule.

7. **Mr. MAHMOOD** (Pakistan) said his delegation was flexible regarding article 14. On article 15, concerning admissibility, it supported the principle of the primacy of national jurisdiction, which was necessary in order to preserve national sovereignty and to avoid situations of conflict between the jurisdiction of the State and the jurisdiction of the Court. It should be the responsibility of the State to prosecute criminals: the Court's role should be to complement the State's judicial system if the latter proved inadequate.

8. He found article 17 generally acceptable, although in his view States which were not States parties, even if interested, should not be permitted to challenge the Court's jurisdiction. He could accept paragraphs 1 and 2 of article 18, but paragraph 3 created problems in challenging the jurisdiction and procedures of national courts. He could support deletion of article 19. He found the text of article 20 acceptable, with a preference for option 1 of paragraph 1 (c).

9. **Ms. LI Yanduan** (China) said her delegation could agree to deletion of article 14. In article 15, the criteria for determining the unwillingness of a State to carry out an investigation listed in paragraph 2 were highly subjective, and gave the Court unduly wide powers. In fact, the judicial systems of most countries were capable of functioning properly: the cases of Rwanda and the former Yugoslavia were exceptions to the rule. In order to make the wording more objective, she proposed that in paragraph 2 (a) the words "in violation of the country's law" be added after the words "the national decision was made". In paragraph 2 (b), a reference to "national rules of procedure" should be included, and in paragraph 2 (c) a reference to "the general applicable standards of national rules of procedure". She supported the amendments proposed by Mexico. In article 17, the words "or a suspect" should be retained in paragraph 2 (a) and the words "a State" used in paragraph 2 (b). She could accept article 18, but considered that article 19 should be deleted.

10. **Mr. RAMA RAO** (India) said that, as his delegation saw it, the principle of complementarity, implying the primacy of national criminal jurisdictions, should be the bedrock of the entire Statute. He was flexible on article 14, but on article 15 he shared the views expressed by the representative of China concerning the criteria for determining unwillingness on the part of a State to prosecute, and would prefer the alternative approach suggested. He could accept the text proposed by the United States for article 16, subject to the same reservation regarding criteria for determining unwillingness, and could also accept article 18. Article 19 should be deleted.

11. **Mr. R. P. DOMINGOS** (Angola) considered that article 14 should incorporate paragraph 1 of article 17, and should be retained. He supported the amendments proposed by Mexico for article 15, and considered that the term "suspect" should be used in paragraph 2 (a) of article 17. Article 19 was important and should be retained, and he supported option 2 for paragraph 1 (c) of article 20.

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12. **Mr. Young-wook CHUN** (Republic of Korea) said his delegation could agree to delete article 14, but supported retention of article 15. In article 17, paragraph 2, he would prefer to delete "or a suspect" in subparagraph (a), and would opt for "State Party" in subparagraph (b). He favoured retention of articles 18 and 19.

13. **Mr. NYASULU** (Malawi) endorsed the view that article 14 should be deleted. In article 15, he proposed that the word "genuinely" should be deleted in paragraph 1 (a) and (b). Paragraph 1 (c) could perhaps refer to "indictment proceedings" rather than a "complaint". Paragraphs 2 and 3 were very important and should be retained as they stood. He was not sure whether article 16 was necessary; he suggested that it might be taken up at a later stage together with articles 55 and 56. In article 17, paragraph 3, he proposed that "The challenge must take place" be replaced by "The challenge shall be made", and that "at a time later than the commencement of the trial" be replaced by "at a later stage". The last two lines of paragraph 3 appeared to him unnecessary, and paragraph 4 appeared to contradict paragraph 3. He proposed that paragraph 6 be deleted; once the Court had decided that a case was inadmissible, the Prosecutor would have to accept that decision. He endorsed the general view that article 19 should be deleted.

14. **Mr. KERMA** (Algeria) said that it was important clearly to define the principle of complementarity in the Statute in order to ensure that the Court would be accepted by the entire international community. He could go along with the majority view that article 14 should be deleted, provided that its contents were reflected in article 17.

15. He could support the Mexican proposal in regard to article 15, and in article 17 favoured the expression "a State" in paragraph 2 (b), as well as deletion of paragraph 6. In regard to article 18, he preferred the alternative approach suggested. Article 19 raised a number of complex and difficult issues and would be better deleted.

16. **Mr. ZELLWEGER** (Switzerland) said that the text of article 15 was the fruit of long discussions and would be best left unchanged. On the other hand, article 16 introduced a number of obstacles which would not contribute to the smooth functioning of the Court: the safeguards and guarantees provided in articles 13 and 17 were quite sufficient in that regard. Article 17, paragraph 2 (a), should read simply "an accused", and paragraph 2 (b) should begin "a State which has jurisdiction ...". Paragraph 6 was important and should be retained, and article 18 represented a compromise solution which should not be altered. While he sympathized with the intent of article 19, he considered that it would raise major drafting problems and would be best omitted.

17. **Mr. AL HUSSEIN** (Jordan) said he could accept the compromise language of article 15, rather than the alternative approach suggested. In article 17, paragraph 2 (b), he too would prefer the expression "a State"; paragraph 6 of the article should be retained. The Japanese proposal for an amendment to article 18 could be considered, and on article 19 he supported the views expressed by Switzerland.

18. **Mr. YEE** (Singapore) said that the formulation of articles 15 and 18 represented a hard-won compromise, and he urged delegations to accept the articles as they stood. In article 17, paragraph 2 (b), his preference would be for "a State" rather than "a State Party", since the former was more in line with the concept of complementarity whereby exercise of jurisdiction was not limited to States parties alone. He could not accept article 19 as it stood, since it would constitute a clear violation of the principle *ne bis in idem* and was hard to reconcile with current rules governing procedure, cooperation and enforcement. Lastly, in relation to article 20, paragraph 1 (c), he was strongly opposed to option 2, which would violate the basic principle of equality of persons of different nationalities before the Court. Option 1 correctly defined how national laws should impact upon the applicable law of the Court.

19. **Mr. VERGNE SABOIA** (Brazil) said that, although he could accept the text of article 15 as it stood, he considered that the language proposed by Mexico would improve paragraph 2 (b) and (c) and paragraph 3. He

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supported the views expressed by Switzerland in regard to article 17, paragraph 2 (a) and (b), and agreed that the many complex issues involved made it very difficult to find an acceptable formulation for article 19.

20. **Mr. DIAZ LA TORRE** (Peru) said his delegation too supported the Mexican proposal for the amendment of article 15, and preferred the term "accused" for article 17, paragraph 2 (a). Article 19 was unnecessary and could be deleted.

21. **Ms. KOLSHUS** (Norway) agreed that the text of article 15 represented an extremely important compromise, which Norway supported without reservation. On the other hand, she was still unconvinced that article 16 was necessary. In article 17, she would prefer "accused" in paragraph 2 (a) and "a State Party" in paragraph 2 (b), and supported retention of paragraph 6. She could accept article 18 but, while appreciating the intent behind article 19, was inclined to agree that it was best deleted.

22. **Mr. BELLO** (Nigeria) endorsed the view that article 14 should be deleted. On article 15, the criteria listed in paragraph 2 were too vague and subjective, and he preferred the alternative approach suggested, which was in line with the principle of complementarity and the third paragraph of the preamble to the Statute. He could accept article 16, subject to improved drafting, article 17 with the deletion of paragraph 6, and article 18, but considered that article 19 should be deleted.

23. **Mr. EL MASRY** (Egypt) said that although his preference would be for retaining article 14, he could go along with the majority view that it should be deleted. Article 15 as now drafted seemed to imply that the complementarity principle should be the exception rather than the rule, and that the Court was a supreme body which could pass judgement on national jurisdictions. The amendments proposed by Mexico improved the text because they introduced a more objective element, and he agreed that the word "genuinely" should be deleted in paragraph 1 (a) and (b).

24. In article 17, he would prefer paragraph 2 (a) to read "an accused or a suspect", and paragraph 2 (b) to begin "a State which has jurisdiction ..."; in paragraph 3, he would prefer that provision be made for making a challenge to the Court's jurisdiction at any time, not only prior to the trial or in exceptional circumstances. In article 18, he preferred the alternative approach. He considered that article 19 could be deleted.

25. **Mr. FADL** (Sudan) said that since so many speakers had emphasized the importance of the principle of complementarity, the Committee's task was now to ensure that that principle was adequately reflected in the text of the Statute. In his view, the existing text of article 15 was not clear and he supported the Mexican proposal. He agreed that articles 16 and 19 could be deleted.

26. **Mr. POLITI** (Italy) considered that the text of article 15 should remain unchanged. Article 16 as now drafted appeared to create a number of complicated procedural obstacles to the exercise of the Court's jurisdiction, which would have the effect of unnecessarily delaying the start of an investigation, but he would be ready to consider any revised formulation which might be put forward.

27. On article 17, he would like paragraph 2 (a) to read simply "an accused". While he was flexible regarding paragraph 2 (b), his preference was for the wording "a State Party"; he would be reluctant to allow States not parties, which did not share the burden of obligations under the Statute, to share the privilege of challenging the jurisdiction of the Court. On paragraph 6, he agreed that the Prosecutor should have the right to request a review of a decision of inadmissibility. He supported the text proposed for article 18 but, while sympathizing with the principle behind the proposal for article 19, agreed that it would be difficult to reach agreement on the text.

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28. **Mr. GÜNEY** (Turkey), referring to the Mexican proposals contained in document A/CONF.183/C.1/L.14, said that he had earlier expressed the view that article 12 should be deleted; it followed that he could not support the article 12 *bis* proposed by Mexico. On the other hand, the proposals for article 15 represented a substantial improvement which his delegation could support.

29. He could accept the deletion of article 14 provided that its contents were faithfully reflected in article 17.

30. **Mr. GEVORGIAN** (Russian Federation) said that while his delegation did not consider retention or deletion of article 14 to be a major issue, articles 15 to 18 were of exceptional importance, because they would determine the extent to which States participated in the Statute, and hence the effectiveness of the Court. The first task of the Conference was to reach a generally acceptable agreement on the wording of those articles, and he urged that in carrying out that task all the views put forward by previous speakers, in particular by the representatives of China, India, Indonesia, Pakistan, Mexico, Egypt and Turkey, should be taken into account.

31. **Ms. TOMIČ** (Slovenia) said she supported article 15 as it stood. Her preliminary view on the Mexican proposals was that they would establish an additional threshold at a very early stage of the proceedings: her delegation would prefer not to go beyond the standards set in article 13 as now drafted. In article 17, paragraph 2 (a), she would prefer the term "an accused", and in paragraph 2 (b) would prefer "an interested State", which would cover both States parties and States not parties. She supported inclusion of paragraph 6 of that article, and favoured retention of articles 18 and 19.

32. **Mr. CHERQUAOUI** (Morocco) considered that article 14 should be retained, or else have its contents inserted in article 17. Concerning article 15, he preferred the alternative approach suggested, which would better ensure compliance with the principle of complementarity with national jurisdictions. He was flexible regarding article 17 and supported article 18 as it stood. He favoured deletion of article 19 and in article 20 preferred option 2 for paragraph 1 (c).

33. **Mr. TAFA** (Botswana) said he would prefer article 14 to be deleted, since its intent was already well articulated in article 17. Article 15 embodied the principle of complementarity excellently and he appealed to the Committee to leave it unchanged. He found article 17 generally acceptable, although in paragraph 2 (a) he would prefer "an accused" and in paragraph 2 (b), "a State". He fully supported article 18, which embodied a fundamental principle of criminal law, but considered that article 19 was fraught with controversy and would be better omitted.

34. **Mr. STILLFRIED** (Austria) said that article 15 was a carefully drafted compromise which ought to be left unchanged. Like many other delegations, he was unconvinced of the need to keep article 16, at least in its current form. Concerning article 17, paragraph 2 (a), he would prefer "an accused", but remained flexible regarding paragraph 2 (b), and supported retention of paragraph 6. Article 18 also represented a carefully drafted compromise, and he would prefer it to be retained as it stood. While sympathizing with the underlying concept of article 19, Austria recognized that it involved very delicate problems which would be difficult to resolve.

35. **Mr. MINOVES TRIQUELL** (Andorra) said the question of admissibility was central to the debate on the establishment of the Court. His Government attached great importance to the principle of complementarity, and considered that the system of checks and balances provided for under articles 13, 15 and 17 was sufficient to ensure that the jurisdiction of the Court was compatible with the judicial sovereignty of States. He had strong doubts as to the need for article 16. On article 17, it might be useful to consider including in paragraph 4 a specific time limit for challenges by a State, and he favoured retention of paragraph 6. He supported inclusion of article 19.

36. Ms. WONG (New Zealand) said that in her view it would be dangerous to reopen debate on article 15, the text of which represented the outcome of long and difficult negotiations. She had some concerns about article 16, which appeared to provide at least three opportunities for States to contest the Court's jurisdiction on the same matter. Article 19 was interesting and would increase the Court's effectiveness, but she recognized that there were problems associated with it.

37. Mr. VAN BOVEN (Netherlands) agreed that article 15 should be retained. On the question of admissibility, he believed that, as a general principle, domestic legislation granting impunity for heinous crimes covered by the Statute should not be a basis for determining that a case before the Court was inadmissible.

38. Concerning article 17, paragraph 2 (a), he favoured the term "an accused", and in paragraph 2 (b), the term "a State Party". He strongly supported the provision in the same paragraph to the effect that, in proceedings with respect to jurisdiction or admissibility, not only those submitting the case but also victims should be entitled to submit observations to the Court. He favoured retention of paragraph 6. Article 18, likewise the result of lengthy negotiations, was acceptable to his delegation, and he wished to express support for article 19, which embodied an important principle.

39. Ms. VARGAS (Colombia) supported the amendments proposed by Mexico to article 15, and those proposed orally by the United States to article 16. For article 17, paragraph 2 (b), she favoured using the expression "a State", but the wording should perhaps be made clearer.

40. Mr. NIYOMRERKS (Thailand) favoured deletion of article 14 but could support articles 15 and 16. For article 17, paragraph 2 (a), he would prefer "an accused" and in paragraph 2 (b) "a State". He supported retention of articles 18 and 19, and favoured option 2 for paragraph 1 (c) of article 20.

41. Mr. PHAM TRUONG GIANG (Viet Nam) said that complementarity was a fundamental principle of the Statute. According to that principle, whenever national jurisdiction was available to try a particular case, that case would not be admissible before the Court, and conversely a person who had been tried by the Court could not be tried again by another court.

42. He too favoured deletion of article 14, which was already reflected in article 17, but could accept the compromise text contained in article 15, which embodied the principle of complementarity. He would propose the deletion of paragraph 6 of article 17. He had no difficulty with article 18 but would favour deletion of article 19.

43. Mr. PEREZ OTERMIN (Uruguay) said that the task of the Conference was to strike a proper balance between the authority of the Court and the authority of legitimately constituted national judicial systems. For decisions by the Court to be given precedence over the decisions of national courts would not be in line with the notion of complementarity.

44. He supported article 15 in principle but considered that the Mexican proposals would improve the text. His delegation would suggest that the words "without grounds" be added after the word "unwilling" in paragraph 1 (a), and that the word "unfounded" be added before "purpose" in paragraph 2 (a). That change would help to safeguard the legitimate right of States to take decisions in the interests of national security.

45. His delegation had no objections to the deletion of article 14 provided that the principle it contained was clearly embodied in article 17. Concerning article 17, he too preferred the wording "an interested State" in paragraph 2 (b). He favoured article 18 but agreed that article 19 would be best deleted.

46. **Mr. DIAZ PANIAGUA** (Costa Rica) supported the view that discussion of article 15 should not be reopened, and did not think the Mexican proposals would improve the text. He saw no need for article 16, and on article 19 he considered that the problem would be better dealt with through cooperation between the Court and the court which had carried out the initial trial.

47. **Mr. AL ANSARI** (Kuwait), referring to article 17, said that in his view the right to make challenges should be limited to States parties. The text of article 18 would be improved if paragraphs 1 and 2 were combined in a single paragraph. Although the wording of article 19 was perhaps not sufficiently precise, he had no problem with it in legal terms.

48. **Mr. AL-AZIZI** (Oman) said that in respect to article 15 his delegation supported the alternative approach suggested. He supported article 17, and for article 18 favoured the alternative approach. Article 19 should be deleted.

49. **Mr. MIRZAEE YENGEJEH** (Islamic Republic of Iran) joined earlier speakers in emphasizing the central importance of the principle of complementarity. He supported deletion of article 14, and for article 15 preferred the alternative approach. In article 17, paragraph 2 (b), he would prefer the term "a State", and would support deletion of paragraph 6 in the same article. While endorsing paragraphs 1 and 2 of article 18, he would prefer the deletion of paragraph 3. Lastly, he supported the deletion of article 19.

Article 20

50. **The CHAIRMAN** invited Mr. Saland (Sweden) to introduce article 20.

51. **Mr. SALAND** (Sweden), acting as Coordinator, said that article 20 was a key article of the Statute in that it indicated how "law" was to be interpreted. Discussion in the Preparatory Committee had shown considerable support for the order of precedence set out in paragraph 1, whereby the Court would apply firstly the Statute, secondly if necessary applicable treaties and rules of international law and, lastly, national law in one way or another.

52. He drew attention to the two options suggested for paragraph 1 (c). Under option 1, which had had the support of the broad majority, the Court would not apply any national law directly, but would rather apply general principles derived from laws to be found in different national legal systems. Under option 2, the Court would apply national law directly. Paragraph 2 of the article made reference to case law, and paragraph 3, which was a consensus text, required that the law applied should be consistent with certain internationally recognized values.

53. The United States proposal for paragraph 1 (a) (A/CONF.183/C.1/L.9) touched on a question of principle which had a bearing on many parts of the Statute, and he did not think that question could be resolved solely within the context of article 20. Concerning paragraph 3, he pointed out that footnote 63 in document A/CONF.183/2/Add.1 was now obsolete since the matter had already been dealt with in the context of article 21. The only issue of substance that remained to be discussed was therefore the choice of options for paragraph 1 (c), and he urged that discussion of it should be kept as brief as possible. Any outstanding issues could be dealt with in informal consultations.

54. **Mr. CHUKRI** (Syrian Arab Republic) said he had no basic problem with the text of article 20. He would prefer paragraph 1 (b) to read "if necessary, applicable treaties and the principles and rules of public international law, including the established principles of either the Geneva Conventions or international humanitarian law". For paragraph 1 (c), he favoured option 2.

55. **Mr. KOUAKOU BROU** (Côte d'Ivoire), supported by **Ms. SINJELA** (Zambia), said he favoured deletion of the brackets in paragraph 1 (b). Concerning paragraph 1 (c), he preferred option 1, since general principles of law derived from national laws came closer to international law, and thus would be more practical for the judge to apply as well as being an additional guarantee for the person being prosecuted. He supported retention of paragraphs 2 and 3.

56. **Mr. AL NOAÏMI** (United Arab Emirates) said that the Arabic version of paragraph 1 (b) should be aligned with the English version. For paragraph 1 (c), he would prefer option 2, with the deletion of the words "and only in so far as it is consistent with the objectives and purpose of this Statute" after the words "failing that".

57. **Mr. NYASULU** (Malawi) said that for paragraph 1 (c) he would prefer option 1. The words within brackets were taken care of by paragraph 3, and could therefore be deleted.

58. **Mr. AGBETOMEY** (Togo) also preferred option 1.

59. **Mr. JARASCH** (Germany) said he would prefer the phrase within brackets in paragraph 1 (b) to be retained. For paragraph 1 (c) he favoured option 1, and he could accept paragraphs 2 and 3. The United States proposal regarding paragraph 1 (a) should be dealt with in another context.

60. **Mr. BELLO** (Nigeria), referring to paragraph 1 (c), said that in his view option 1 lacked clarity and gave wide discretionary powers to the Court which were not based on any set criteria. He therefore preferred option 2.

61. **Mr. AL ANSARI** (Kuwait) said that for paragraph 1 (c) he would prefer option 1, with the words "of legal systems" replaced by "and from rules and regulations which constitute the legal systems". The words in brackets should be included.

62. **Ms. LI Yanduan** (China) said that for paragraph 1 (c) her delegation would prefer option 2.

63. **Mr. SALINAS** (Chile) said he would prefer paragraph 1 (b) to include a mention of international humanitarian law. For paragraph 1 (c) he favoured option 1.

64. **Mr. BAZEL** (Afghanistan) said he too would support removal of the brackets in paragraph 1 (b), but would suggest that "including the established principles of the law of armed conflict" be replaced by "including the established principles of international humanitarian law". For paragraph 1 (c), he favoured option 2.

65. **Mr. NATHAN** (Israel), referring to paragraph 1 (b), considered that the bracketed phrase "including the established principles of the law of armed conflict" was unnecessary and could be deleted, since such principles obviously formed part of the principles of general international law. For paragraph 1 (c) he preferred option 1, since option 2 might have the effect of causing confusion and conflict in the Court's jurisprudence.

66. **Mr. TAFA** (Botswana) also considered that the bracketed words in paragraph 1 (b) should be deleted. For paragraph 1 (c) he preferred option 1; option 2 was too prescriptive.

67. **Ms. TOMIČ** (Slovenia) said she too would prefer deletion of the words in brackets in paragraph 1 (b). For paragraph 1 (c) she would favour option 1, which would guarantee for everyone the fundamental principle of equality before the law and before the Court.

68. **Mr. KROKHMAL** (Ukraine) said his delegation unconditionally supported article 20 as a whole, with a preference for option 1 for paragraph 1 (c), with the wording in brackets included, though it could perhaps be redrafted in positive terms.

69. **Mr. PALACIOS TREVIÑO** (Mexico) said he had no problem with paragraph 1 but had some small changes to propose. In paragraph 1 (a), the words "and its Rules of Procedure and Evidence", and in paragraph 1 (b) the words "if necessary", should be deleted. The bracketed words in paragraph 1 (b) should be included, and for paragraph 1 (c) he would prefer option 1.

70. **Mr. EL MASRY** (Egypt) said he would have no problem in accepting article 20 with the amendment proposed by the representative of Syria, and with option 2 for paragraph 1 (c).

71. **Mr. Young-wook CHUN** (Republic of Korea) supported the inclusion of the bracketed words in paragraph 1 (b), and for paragraph 1 (c) favoured option 1, but with the words in brackets deleted.

72. **Ms. DASKALOPOULOU-LIVADA** (Greece) considered that in paragraph 1 (b) the words in brackets were superfluous, since international law in any case included the law of armed conflict. She could agree to inclusion of a reference to international humanitarian law, and could support the Mexican representative's proposal for the deletion of the words "if necessary". For paragraph 1 (c), she supported option 1, with the inclusion of the words in brackets, which provided a useful safeguard.

73. **Mr. ADAMOU** (Niger) said that his delegation too favoured option 1 for paragraph 1 (c).

74. **Ms. VENTURINI** (Italy) considered that the bracketed text in paragraph 1 (b) should be included in order to highlight the importance of the principles of the law of armed conflict in matters to be decided by the Court. For paragraph 1 (c) she favoured option 1, with inclusion of the bracketed text, which was fully in conformity with the tradition of international instruments.

75. **Mr. ADDO** (Ghana), **Mr. KAM** (Burkina Faso) and **Mr. COTTIER** (Switzerland) supported the previous speaker's position.

76. **Mr. M'LU HONGO KABINDA-NGOY** (Democratic Republic of the Congo) considered that the drafting of paragraph 1 (a) could be clarified, and favoured deletion of the bracketed text in paragraph 1 (b). He preferred option 1 for paragraph 1 (c), with deletion of the bracketed text.

77. **Mr. AL-HAJERY** (Qatar) favoured option 2 for paragraph 1 (c).

78. **Mr. SCHEFFER** (United States of America) said that, in document A/CONF.183/C.1/L.9, his delegation was proposing that the words "and its Rules of Procedure and Evidence" in paragraph 1 (a) should be replaced by "including its annexes". The annexes, however they were ultimately negotiated, should be an integral part of the Statute and therefore should have priority in any applicable law applied by the Court. He strongly supported

inclusion of the bracketed text in paragraph 1 (b), since there was a need to ensure that war crimes were interpreted with reference to such principles as proportionality and military necessity, which were included in the law of armed conflict. For paragraph 1 (c) he favoured option 1 with the deletion of the bracketed text.

79. **Ms. VARGAS** (Colombia) said that it was unclear what was meant by "applicable treaties" in paragraph 1 (b). For paragraph 1 (c) she favoured option 1, with inclusion of the bracketed text.

The meeting rose at 1.05 p.m.

UNITED NATIONS

United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

Rome, Italy
15 June-17 July 1998

Distr.
GENERAL

A/CONF.183/C.1/SR.13
20 November 1998

ORIGINAL: ENGLISH

COMMITTEE OF THE WHOLE

SUMMARY RECORD OF THE 13th MEETING

Held at the Headquarters of the Food and Agriculture Organization of the United Nations on Tuesday, 23 June 1998, at 3 p.m.

Chairman: Mr. P. KIRSCH (Canada)

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The meeting was called to order at 3.10 p.m.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT, IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (*continued*) (A/CONF.183/2/Add.1 and Corr.1; A/CONF.183/C.1/L.9)

Part 2 of the draft Statute (*continued*)

Article 20 (*continued*)

1. **Ms. SHAHEN** (Libyan Arab Jamahiriya) said that her delegation accepted all three paragraphs of article 20 and preferred option 2 for paragraph 1 (c).

2. **Ms. WILMSHURST** (United Kingdom) said that her delegation preferred option 1 for paragraph 1 (c). Paragraph 3 could perhaps be shortened: it could end with the words "human rights" in the second line.

3. **Mr. SHARIAT BAGHERI** (Islamic Republic of Iran) said that his delegation supported the proposal made at the last meeting by the representative of Syria to replace the words "general international law" in paragraph 1 (b) by "public international law". The phrase in square brackets should be deleted. Option 2 for paragraph 1 (c) was to be preferred. Paragraph 2 was acceptable. With regard to paragraph 3, in view of the differences between the various legal systems as far as the concept of human rights was concerned, it might be better to speak of human rights norms recognized by the international community or recognized by the main legal systems.

4. **Mr. MANSOUR** (Tunisia) thought that article 20 should be retained in its entirety and the square brackets deleted. Option 2 for paragraph 1 (c) was preferable to option 1.

5. **Mr. ONKELINX** (Belgium) said that his delegation could accept article 20 with option 1 for paragraph 1, subparagraph (c). Option 2 established a hierarchy among national laws which was out of place in view of developments in international law. With option 1, some textual alignment might be necessary between subparagraphs (b) and (c).

6. **Mr. SKIBSTED** (Denmark) said that his delegation could accept subparagraphs (a) and (b) of paragraph 1, including the bracketed portion, and preferred option 1 for subparagraph (c), including the bracketed portion. In view of the point made in footnote 63 in document A/CONF.183/2/Add.1 regarding the principle of *nullum crimen sine lege*, Denmark considered that general principles derived from the various legal systems should be drawn upon only to fill any potential lacunae in the Statute, in treaties and in customary international law.

7. **Mr. JANDA** (Czech Republic) said that his delegation could accept article 20 with the deletion of the phrase in square brackets in paragraph 1 (b) and with option 1 for paragraph 1 (c), including the bracketed text.

8. **Mr. OUMAR MAIGA** (Mali) said that his delegation could support article 20 with the deletion of the bracketed phrase in paragraph 1 (b) and with option 1 for paragraph 1 (c), with the deletion of the bracketed text.

9. **Mr. GEVORGIAN** (Russian Federation) said that his delegation was in favour of subparagraph (a) of paragraph 1 and agreed with the Mexican delegation that the words "if necessary" in subparagraph (b) should be deleted. The words in square brackets in that subparagraph were superfluous, but his delegation would not insist

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on their deletion. It had a clear preference for option 1 for subparagraph (c), and supported the proposal by the United Kingdom that paragraph 3 should end with the words "human rights".

10. **Mr. YEPEZ MARTINEZ** (Venezuela) said that the words "in the first place" should be deleted from subparagraph (a) of paragraph 1 and the words "if necessary" should be deleted from subparagraph (b). The phrase in square brackets in subparagraph (b) should be retained, but explicit reference should be made to international humanitarian law. Option 1 for subparagraph (c), without the phrase in square brackets, was preferable to option 2. Paragraph 2 was necessary because it would enable the Court to take into account previous decisions, but more precise wording would be preferable.

11. **Mr. BARTON** (Slovakia) said that his delegation supported article 20 with option 1 for paragraph 1 (c).

12. **Mr. ABOLY** (Guinea) said that, if subparagraph (b) of paragraph 1 were to be amended by the deletion of the words "if necessary", the words "in the first place" in subparagraph (a) should also be deleted. Subparagraph (b) might be amended to read: "applicable treaties and the principles and rules of international humanitarian law", the phrase in square brackets being deleted. His delegation was in favour of option 1 for subparagraph (c) with the deletion of the words in square brackets.

13. **Mr. Khalid Bin Ali Abdullah AL-KHALIFA** (Bahrain) said that his delegation supported article 20 in general and agreed with other delegations that the phrase in square brackets in subparagraph (b) of paragraph 1 should be deleted. It preferred option 2 for subparagraph (c).

14. **Ms. KAMALUDIN** (Brunei Darussalam) said that her delegation supported article 20 generally. The words "if necessary" in subparagraph (b) of paragraph 1 should be retained and the phrase in square brackets deleted. She preferred option 1 for subparagraph (c) with the deletion of the words in square brackets.

15. **Mr. SIMPSON** (Australia) said that his delegation supported paragraph 1, subparagraph (a), and was open-minded about the inclusion of the phrase in square brackets in subparagraph (b). It supported option 1 for subparagraph (c) and was flexible about the words in square brackets. Paragraphs 2 and 3 were acceptable as they stood.

16. **Mr. HOLMES** (Canada) said that his delegation supported subparagraphs (a) and (b) of paragraph 1 and had no strong position on the inclusion or otherwise of the text in square brackets. It favoured option 1 for subparagraph (c) with the retention of the words in square brackets. Paragraphs 2 and 3 should remain as drafted.

17. **Mr. SAENZ DE TEJADA** (Guatemala) said that his delegation supported article 20. The phrase in square brackets in paragraph 1, subparagraph (b), was unnecessary but could be accepted. Option 1 for subparagraph (c) was preferable to option 2.

18. **Mr. AL HAFIZ** (Saudi Arabia) said that his delegation would prefer the deletion of the phrase in square brackets in paragraph 1, subparagraph (b), and the replacement of the words "general international law" by "international humanitarian law". It preferred option 2 for subparagraph (c).

19. **Mr. SADI** (Jordan) said that his delegation had no objection in principle to option 1 for paragraph 1 (c) but would prefer simpler wording, such as: "failing that, national laws only in so far as they are consistent with the objectives and the purpose of this Statute".

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The meeting rose at 3.30 p.m.

The meeting was called to order at 10.10 a.m.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (*continued*) (A/CONF.183/2/Add.1 and Corr.1; A/CONF.183/C.1/L.16)

Part 4 of the draft Statute

1. **Mr. RWELAMIRA** (South Africa), Coordinator for Part 4, said he thought that some of the articles in Part 4 of the draft text in document A/CONF.183/2/Add.1 were already at a stage where they could be referred to the Drafting Committee without debate or with very little debate in the Committee of the Whole. He suggested that the Committee might consider transmitting subparagraphs (a), (c) and (d) of article 35 to the Drafting Committee without any debate. Paragraphs 1 and 2 of article 39 contained no particular problems and might also be transmitted to the Drafting Committee. Paragraph 3 could also be sent to the Drafting Committee if the Committee of the Whole took the view that the content of the square brackets in subparagraph (a) was already covered by the notion of "the due administration of the Court".

2. Article 41 as it stood was a well-balanced and well-considered compromise text arrived at after extensive debate in the Preparatory Committee, and might likewise go to the Drafting Committee. Paragraphs 1, 2 and 3 of article 45 could also be sent on without further debate, but some discussion on paragraph 4 might be required.

3. Other articles recommended for transmission to the Drafting Committee were articles 46 and 48. A small correction was needed in article 48: "article 47" should be inserted after "set out in". He would also suggest that, as article 48 dealt with misconduct of a less serious nature than article 47, the second of the two bracketed alternatives in article 48, referring to the Regulations of the Court, might be chosen. The Committee might also wish to delete the bracketed reference to the Rules of Procedure and Evidence in article 50. Articles 46, 48, 50 and 51 could then go to the Drafting Committee.

4. The rest of the articles in Part 4 could be handled in two stages. Articles 35, 36, 37 and 40 raised difficult problems and could be debated first. After some discussion in the Committee of the Whole, they could be referred to an informal group, which the United Kingdom delegation had already agreed to coordinate.

5. After that, the Committee could take up the remaining provisions, namely articles 38, 39, 42 to 45, 47, 49, 52 and 53, as a second "cluster" of provisions.

6. Turning to the cluster of provisions that he had suggested should be considered first, he said, with regard to article 35 (b), that there had been a divergence of views in the Preparatory Committee on the question of whether there should be one or more pre-trial chambers. That question would need discussion.

7. Under article 36, the question of whether some Court judges should serve on a part-time basis, and whether the decision as to which judges should serve part-time should be taken by the Presidency or by States parties on the recommendation of the Presidency, would undoubtedly require debate in the Committee. His own feeling was that the matter should be left to the Presidency to decide in the light of the volume of work in the Court.

8. Article 37, which should perhaps be discussed jointly with article 40, raised the issue of the number of Court judges and whether, and if so how, the number of judges could be increased or decreased after the Court had been

established. Paragraph 3 (b) dealt with the balance that should exist in the Court between judges with expertise in criminal law and those with expertise in international law. It would affect other provisions in the Statute, notably paragraphs 1, 5 and 6 of article 40. The options in paragraph 4 of article 37 concerning the nomination of judges, and paragraph 5 on the election of judges, would require debate. Paragraph 8 had been extensively debated in the Preparatory Committee. His recommendation would be that the square brackets around subparagraphs (b), (d) and (e) should be removed and that the alternative "bear in mind" should be used rather than "take into account the need for" in the *chapeau*.

9. The question of whether judges should hold office for five or for nine years under paragraph 10 of article 37 might best be discussed in the proposed informal group.

10. Article 40 might usefully be debated briefly in the Committee prior to a more detailed discussion in the informal group. The proposal in paragraph 7 for alternate judges had been debated extensively in the Preparatory Committee and might need discussion in the Committee.

11. The **CHAIRMAN** invited the Committee to give its views on the cluster of provisions that the Coordinator had suggested should be considered first, namely articles 35 (particularly subparagraph (b)), 36, 37 and 40. Comments could also be made at any time on the articles that the Coordinator had suggested should be referred to the Drafting Committee.

12. **Sir Franklin BERMAN** (United Kingdom) said that the issues raised in those articles were among the most fundamental for the entire establishment and structure of an international criminal court. It would be crucial to have provisions which would ensure a court of the right sort of quality.

13. With regard to article 35 (b), it was self-evident that there needed to be a pre-trial function in the Court. Turning to article 36, he said that the question of full-time versus part-time judges had a financial aspect but also raised the issue of the impartiality of judges and the avoidance of conflicts of interest. It was not easy to envisage a court consisting of part-time judges who exercised another function but could serve as judges of that court with complete professional detachment. The United Kingdom was in favour of a full-time court from the ouset.

14. Regarding article 37, it could be assumed to be generally accepted that there should be a system that would ensure judges of the highest quality as members of the Court. More difficult was the question of qualifications. He did not think that it was a matter of competition between criminal law and international law. There would be many people, including some candidates for the Court, who would have experience both in criminal law and practice and in international law. Nor could every candidate for the Court represent an ideal model of the qualifications required. The Statute would set out a pattern and it was to be hoped that as many candidates as possible would come as close as possible to the ideal.

15. There was also a very important distinction between knowledge in particular fields of law and the professional competence and experience which indicated that a candidate was the sort of person likely to be able to deal effectively with the function of judge. Reference should be made to both knowledge and professional qualifications.

16. *The Court should not be over-large.* The functions covered in articles 37 and 40 would suggest a court of around 17 members. It should be structured around pre-trial, trial and appeal functions. The professional activity involved at those three different levels was not identical and some discussion would be required on the numbers and on the qualities and qualifications needed at each level. That area had not been addressed in detail in the Preparatory Committee.

17. There should be a certain degree of flexibility in the composition of the Court, and there should be provision for the movement of judges between one function and another, with the exception of the appeal function. It would be neither proper nor possible for judges assigned to the appeal function to be transferred ad hoc to perform any function below that level, as that might impair the appeal function.

18. With regard to the question of nomination and election, it was important that the nominating process should not be a political process but should be one designed to identify candidates who fulfilled the qualifications required by the Statute. One possibility would be to follow the procedure used for elections to the International Court of Justice and have the national groups in the Permanent Court of Arbitration nominate candidates. Another would be to rely on procedures used within each State for the selection of its own judges. Election must be by secret ballot in the Assembly of States Parties, and it was fundamental that nothing in the Statute could in any way affect the right of each State party to make its own choice as to which candidate it would vote for. However, there could be some screening process between the completion of the nomination phase and the election phase, to enable Governments to make a good choice. In the United Kingdom's experience of such elections, Governments were often confronted with a list of candidates without the necessary information to help them to choose. One great advantage of an objective screening process was that it could help States parties take into account the criteria referred to in paragraph 8 of article 37, as well as the qualities of the individual candidates.

19. **Mr. IMBIKI** (Madagascar) said that article 35 (b) should provide for two pre-trial chambers. There should also be a provision allowing the President to move judges between the different chambers as required. Under article 36, judges should serve on a full-time basis once the Court was seized of a matter. It was undesirable that judges should engage in other activities while serving as judges of the Court.

20. In paragraph 2 (a) of article 37, it should be for the President acting on behalf of the Court to propose increases or decreases in the number of judges. In paragraph 2 (b), a simple majority would be preferable and, under paragraph 5, one half of the States parties should constitute a quorum.

21. In paragraph 8, subparagraphs (d) and (e) might hinder the representation of certain States or groups of States.

22. Paragraph 10 should provide for a nine-year mandate, to be closer to the situation in the International Court of Justice.

23. Paragraph 11 was acceptable as it stood but might be amended to provide for the fact that a judge might be unable to continue to carry out his or her functions. Article 40 should provide for "Pre-Trial Chambers" in the plural and for chambers composed of five judges.

24. **Mr. YAÑEZ-BARNUEVO** (Spain) asked whether article 51 would be submitted to the Drafting Committee together with document A/CONF.183/C.1/L.16, which contained a proposal by 14 delegations, including his own.

25. **The CHAIRMAN** said it was his understanding that article 51 would be referred to the Drafting Committee together with that proposal.

26. **Mr. REBAGLIATI** (Argentina) expressed general agreement with the views expressed by the representative of the United Kingdom. Candidates could be nominated by bodies such as the national groups in the Permanent Court of Arbitration, or through national mechanisms used for the appointment of senior judges. States might prefer either of those options or a combination.

27. With regard to the qualities and qualifications of candidates, the aim would be for candidates to have all the intellectual and moral qualities and qualifications listed, including practical experience in criminal and international law.

28. His delegation was flexible as to whether judges should serve on a full-time or part-time basis. There were precedents in other similar bodies for judges working part-time, with clear limitations on the exercise of other functions. The maximum number of judges should be 17.

29. In discussing the number of judges and their terms of service, the financial implications should not be overlooked. It might not be possible at the outset to finance what might be described as an ideal court.

30. His delegation endorsed the view of the United Kingdom that there should be a screening process for candidates. The mechanism must be objective and equitable geographical distribution must be ensured.

31. **Ms. JOYCE** (United States of America), referring to the suggestions made for provisions to be passed on to the Drafting Committee, said her delegation agreed that articles 35, 41, 46 and 50 should go to the Drafting Committee. As far as article 39 was concerned, the United States would prefer the contents of the square brackets in paragraph 3 (a) to be retained. Further discussion on that matter would be required; informal consultations might be useful.

32. With regard to article 45, the United States had some concerns on paragraph 3 and hoped that it could be considered further informally. Further discussion might also be required on article 48: the United States considered that, since the Prosecutor and judges were concerned, disciplinary measures should be dealt with in the Rules of Procedure and Evidence.

33. It would also be useful to have informal discussions on the proposal in document A/CONF.183/C.1/L.16 concerning article 51.

34. **Mr. SCHEFFER** (United States of America), referring to articles 35, 36, 37 and 40, said that the Court's moral authority would derive from its impartiality and credibility and it would only be as impartial and credible as its judges, the Prosecutor and others who assisted them. They must be individuals of the highest calibre. Despite the common goal of attracting and selecting the best people for the job, the draft Statute still reflected a certain degree of confusion as how to achieve that goal, especially with regard to judges. Some delegations had already been consulting informally in an attempt to find appropriate wording, and the United States was prepared to explore modalities and language, but was committed to certain core concepts. It was especially concerned about the need for criminal trial experience or its equivalent for judges who would be handling cases at the pre-trial or trial levels, whether as judges or advocates. It was critical that, for cases of the gravity of those that would be assigned to the Court, there should be judges with experience in regard to procedures. Some delegations had emphasized the need for judges to have knowledge of international law as well. The accommodation of that concern, however, should not be allowed to compromise the high standard that had been set for the way trials were conducted. The United States continued to believe that there should be a mechanism at the international level whereby countries could gain more information about candidates before election, and perhaps even filter out clearly unqualified candidates, and looked forward to reviewing any proposals from other delegations in that regard.

35. The United States supported the need for overall balance in the composition of the Court and in particular the need to ensure the appointment of qualified women as well as men. Paragraph 8 (e) of article 37, which addressed the need for expertise on sexual and gender violence, was also important. On the basis of its experience in the

Tribunals for the Former Yugoslavia and Rwanda, the United States believed that that issue needed to be covered explicitly in the Statute if the Court was to be responsive to the concerns of women caught up in international and internal conflicts.

36. Regarding the way in which the Chambers were to be set up, the provisions should be limited to broad parameters that would provide the necessary flexibility. The aim should be to set up a court with the capacity to adapt as needed. The need for a pre-trial function was clear. Provision should also be made for some limited rotation of judges between Chambers, but not between the Appeals Chamber and the Trial Chambers, since they were likely to be composed differently in terms of qualifications, and a truly independent Appeals Chamber was of particular importance. The Court should also be explicitly authorized to accept temporary assignments of personnel from States and other organizations, since that would provide a good way for the Court to obtain experienced staff at short notice and for limited periods to help with surges in its caseload.

37. As the United States had already indicated, it would prefer to see the Rules of Procedure and Evidence for the Court finalized before the conclusion of the Conference. Such a critical document would have to be completed before the Court could become operational and it was to be hoped that a way would be found to address that issue as soon as possible.

38. **Mr. VERWEIJ** (Netherlands) agreed that there should be continued informal consultations on the election and qualifications of judges.

39. With regard to article 35, he strongly favoured the establishment of a pre-trial chamber, but was flexible as to whether there should be one or more. With regard to article 36, he had doubts about the proposal for part-time judges and would appreciate further explanation of how a part-time system would work.

40. Article 37 warranted further study. One of the lessons learned from the ad hoc tribunals in that respect had been that, besides excellent personal qualifications, actual trial experience was vital. It would be particularly important, however, for judges with a knowledge of international law, including international humanitarian law, to be represented in the Chambers.

41. In relation to the selection and election process, further thought was needed on how an objective assessment of candidates could be ensured. He strongly supported the retention of paragraph 8 (e) of article 37.

42. **Mr. BELLO** (Nigeria), referring to article 35, agreed that the Court should have a pre-trial chamber, a trial chamber and an appeals chamber, and thought that the three chambers should be kept separate.

43. He supported the proposals for balanced geographical and gender representation. There should be judges from each geographical group as established by the United Nations General Assembly, and the principal legal systems of the world should be represented. If judges served for a period of five years, they should be eligible for re-election, but not if they served for nine years. Generally speaking, the provisions concerning the judges and the administration of the Court were acceptable, but in article 49 paragraphs 1 and 2 should be merged.

44. **Mr. CHUKRI** (Syrian Arab Republic) said that while he was flexible as to the number of pre-trial and trial chambers to be provided for in article 35 (b), he was in favour of only one appeals chamber. Regarding full-time versus part-time judges (article 36), his understanding was that all judges would be elected at the same time but would only be called upon to perform their functions when the need arose. While the number of judges could not be determined until a decision had been taken on the number of chambers, the number should be between 15

and 21. He fully supported paragraph 3 (a) of article 37; regarding paragraph 3 (b), recognized competence in international criminal law and international humanitarian law was particularly important, without prejudice to specialists in criminal law. International law and criminal law qualifications should be combined for the Appeals Chamber under article 40, paragraph 1.

45. With regard to paragraph 5 of article 37, two thirds of the States parties should constitute a quorum for elections. In the *chapeau* of paragraph 8, the expression "take into account the need for" was preferable to "bear in mind".

46. Paragraph 8 (a) was acceptable. Paragraph 8 (b) was unnecessary, as the main concern was to have as many legal systems as possible represented. Equitable geographical distribution was important, but gender balance might at times cause problems. Paragraph 8 (e) was unacceptable; he knew of no speciality called "gender violence". He hoped that the age restriction in paragraph 9 would be removed.

47. With regard to paragraph 10, five years was too short a period for judges to familiarize themselves with their task and to build up experience. They should hold office for nine years and be eligible for re-election.

48. A three-year period of service would be appropriate in paragraph 2 of article 40. The question of rotation between chambers was a sensitive one and the established rule was that no judge could consider a case in two different capacities. Provision should be made to avoid that.

49. **Mr. MATSUDA** (Japan), referring to article 35 (b), said that he would prefer pre-trial chambers set up on a case-by-case basis rather than a permanent chamber. In article 36, the second sentence should be deleted. In the last sentence, he agreed with the Coordinator that the Presidency should decide whether there was a need for judges serving on a full-time basis.

50. Without regard to paragraph 3 of article 37, his delegation shared the view that pre-trial chamber and trial chamber judges should have criminal trial experience. However, to allow people who were highly competent in international law to become judges of the Court, it would be appropriate to require either criminal trial experience or knowledge of international law. To ensure that there were enough judges with criminal trial experience, paragraph 7 should be retained and should require two thirds of the judges to have such experience.

51. In paragraph 4 of article 37, he preferred option 1. Under paragraph 5, judges should be elected by a two-thirds majority of the Assembly of States Parties. There should be no age limit, as in other similar bodies, and paragraph 9 should be deleted.

52. With regard to article 40, a term of office was inappropriate for chambers set up on a case-by-case basis. Paragraph 4 should therefore be deleted.

53. **Mr. PERRIN DE BRICHAMBAUT** (France) said that at least one pre-trial chamber should be established as soon as judges were elected. Experience in criminal law matters and experience in international law should be alternatives. Rather than having to have a specific number of years of professional experience, it should be sufficient for judges to have extensive criminal law experience and the qualifications needed in their respective States for appointment to the highest judicial offices.

54. There should be at least 18 judges, elected by an absolute majority by the Assembly of States Parties on the basis of nominations submitted by each State party according to its national procedures.

55. The French delegation endorsed the views expressed by the United Kingdom delegation in respect of the examination and confirmation of the qualifications of judges. To guarantee their independence, judges should be elected for a non-renewable period of nine years.

56. **Mr. YEPEZ MARTINEZ** (Venezuela) said that he was prepared to agree to pre-trial chambers although in principle he felt that they were unnecessary, particularly at the outset. Members of the Court should devote themselves exclusively to their judicial functions, and should therefore serve on a full-time basis. Regarding article 37, he had no definite position on the number of judges; that would have to be determined on the basis of such criteria as geographical distribution and the need to include the world's main legal systems. The square brackets should be removed in paragraph 3 (a). Option 1 for paragraph 4 should be chosen; only States parties should be able to nominate judges for the Court. Paragraph 5 was acceptable, but the Assembly of States Parties should elect the judges by a two-thirds majority. Two thirds of the States parties should constitute a quorum. Paragraph 8 should refer to States parties and require representation of the principal legal systems of the world and equitable geographical distribution to be taken into account. Paragraph 9 could be deleted.

57. Paragraph 4 of article 39 was unnecessary. Regarding article 49, the privileges and immunities of members of the Court could be covered by a headquarters agreement with the host State. The question of working languages should be determined by consensus.

58. **Mr. TANKOANO** (Niger), referring to article 36, said that judges should serve on a full-time basis as in the International Court of Justice, irrespective of the number of cases before the Court.

59. **Mr. BARTON** (Slovakia), referring to article 35, said that he was flexible as to whether there should be one or several pre-trial chambers. With regard to article 36, judges should serve on a full-time basis. In article 37, paragraph 1, the number of judges should be between 15 and 18, and the text in square brackets should be kept. With regard to qualifications, the Court should consist of judges with experience in criminal and international law, but at the pre-trial and trial levels there should be a predominance of judges with criminal law experience. In the Appeals Chamber, there should be a balance of experience between criminal law and international law.

60. Judges should be elected by the Assembly of States Parties. Subparagraphs (d) and (e) of paragraph 8 were acceptable. A nine-year period would be appropriate in paragraph 10.

61. **Mr. LARREA DAVILA** (Ecuador) said that his delegation endorsed the comments made by the representative of Spain in connection with article 51 and associated itself with the sponsors of document A/CONF.183/C.1/L.16.

62. **Mr. MANSOUR** (Tunisia) said that the Court should consist of an appeals chamber, a trial chamber and a pre-trial chamber, the number of trial and pre-trial chambers depending on the number of cases before the Court. Judges should serve on a full-time basis. With regard to article 37, it was important that the principal legal systems and equitable geographical distribution should be taken into account in the election of judges, but paragraph 8 (e) was not necessary. The number of judges could vary according to the number of cases before the Court. He preferred option 2 for paragraph 4. The qualifications of judges in the Appeals Chamber and the Pre-Trial Chamber should not necessarily be the same. The Appeals Chamber should require higher qualifications and consist of five judges whereas the Pre-Trial Chamber should consist of three.

63. **Mr. SÖZEN** (Turkey) said that Part 4 of the draft Statute did not pose any real problems. In article 35, he would prefer an appeals chamber and a limited number of pre-trial chambers. The principle of equitable

geographical distribution should ensure that there was not more than one judge from the same State. An age limit for judges was not provided for in the Statute of any other tribunal, and experience was the most important criterion.

64. **Mr. EL MASRY** (Egypt), referring to the articles that it was suggested should be submitted directly to the Drafting Committee, said that it was essential that article 45 should provide for the approval of the staff regulations by States parties. It might also be useful to include a reference to the need to deal with staff complaints, as well as a mechanism for resolving staff disputes. It was not clear in article 46 before whom the solemn undertaking would be made. It would be premature to submit article 51 to the Drafting Committee before taking a decision on document A/CONF.183/C.1/L.16, which his delegation fully supported.

65. With regard to the cluster of articles now under consideration, he was in favour of pre-trial chambers, in the plural, in article 35 (b). In article 37, paragraph 3 should emphasize impartiality, high moral stature and experience. The requirements in (i) and (ii) of paragraph 3 (b) should be alternatives; they should not both be requirements for each judge. Judges should be nominated by national groups in consultation with Governments. His delegation had strong reservations about the proposals for the Nominating Committee. In view of the many practical difficulties involved, the matter might best be left to the Assembly of States Parties. A possible procedure would be to have a series of ballots, allowing candidates to withdraw if they had little possibility of being elected. His delegation supported subparagraphs (a), (b), (c) and (d) of paragraph 8 but felt that subparagraph (e) was unnecessary; moreover, it did not mention other serious human rights violations such as torture and expulsions.

66. **Mr. PALACIOS TREVIÑO** (Mexico) supported the proposal contained in document A/CONF.183/C.1/L.16, which was consistent with Mexico's general views on the use of the Spanish language. He also supported the comments of the United Kingdom on the professional qualifications for judges of the Court, as well as the methods of nomination and election. The election procedure should be as objective as possible, so that the best individuals, men or women, could be elected without any political influence. Nomination might best be left to national groups such as those in the Permanent Court of Arbitration. He was flexible as to the number of chambers in the Court, provided that there were sufficient to ensure that appeals, trials and pre-trial matters were dealt with by different people. He was also flexible as to the number of judges to be appointed, provided that different judges served different chambers.

67. **Mr. ZELLWEGER** (Switzerland), referring to paragraph 1 of article 37, said that the Court should be composed of no more than 15 judges, at least in its initial stages. Any increase in that number later on should be dealt with in accordance with the provisions on amendments to the Statute referred to in footnote 4 to paragraph 2 (a) of article 37. Switzerland intended to propose a new text for articles 110 and 111 which would cover the matter raised in that subparagraph.

68. With regard to paragraph 3 of article 37, care should be taken not to restrict the choice of candidates through criteria that were too narrow. Criminal trial experience and competence in international law should be alternatives; that was important for countries which did not have as large a pool of candidates representing both areas of competence as did the larger countries. For the same reason his delegation was against the strict criteria proposed regarding the distribution of judges with experience in criminal law and judges with competence in international law in the different chambers.

69. It was important that judges should rotate between the Trial and Pre-Trial Chambers. To ensure that a judge did not hear the same case twice, teams of judges should be established as suggested in the footnote to article 40, paragraph 3.

70. **Mr. AL-THANI** (Qatar), referring to article 36, said that judges should serve on a full-time basis, to ensure complete impartiality. As the Court would be breaking new ground, it would be difficult to specify in paragraph 1 of article 37 the number of judges that would be required. There was also a need to ensure that the number could be increased if necessary. Paragraph 2 of article 37 was acceptable. In paragraph 5, election should be by the Assembly of States Parties on the basis of a two-thirds majority. Paragraph 8 (e) should be deleted because it was unduly selective. Age should not be a barrier to election, provided that a judge was in good health at the time. A five-year period of office would be reasonable, with three-year periods for the chambers under article 40.

71. **Ms. LI Ting** (China) said that the number of pre-trial chambers in article 35 would be determined by need and the provisions should therefore be kept flexible. The question of full-time or part-time service by judges in article 36 should not be determined solely on the basis of financial considerations. However, as the question had financial aspects, it should be decided by States parties.

72. China endorsed the views of Japan and France regarding criminal trial experience and competence in international law under article 37. The two areas of competence should be alternatives. Judges with experience in criminal trials would be required for the trial chambers. Paragraph 8 of article 37 was also important: the impartiality of the Court would depend on judges representing the principal legal systems of the world and there being equitable geographical distribution. The main forms of civilization should be represented; it was important that the Court should consider the stages of development and the situations of the different regions of the world. China was flexible, however, in respect of subparagraphs (d) and (e) of paragraph 8.

73. **Ms. VARGAS** (Colombia) said that she was in favour of the Permanent Court of Arbitration or the national groups referred to in the Statute of the International Court of Justice being responsible for the nomination of candidates. Judges in all chambers should work on a full-time basis except for those who had left the Court but were continuing to deal with cases that had not concluded. Judges should have competence in international law and particularly in international humanitarian law and human rights law, but criminal and trial experience was also important.

74. Judges should be elected by two thirds of the Assembly of States Parties. Among the criteria for election, it was important that the main legal systems of the world were represented, and that there should be equitable geographical distribution and gender balance. Judges should hold office for a term of nine years, non- renewable. The number of members of each chamber would depend on the decision taken on the total number of judges. It should be an odd number and not a high one, and would depend on work requirements.

75. **Mr. JANDA** (Czech Republic), referring to article 36, said that he would prefer judges to serve on a full-time basis from the outset. They should be elected by the Assembly of States Parties, and there should be a mixture of skills relating to criminal and international law among judges working in the Trial Chambers and Appeals Chambers. People with experience in criminal proceedings would be required for the Pre-Trial Chambers. Subparagraphs (d) and (e) of paragraph 8 should be retained with some editorial improvements in subparagraph (e), which could be left to the Drafting Committee.

76. **Mr. NYASULU** (Malawi) said that there should be between 15 and 18 judges to allow for three in the Presidency, seven in the Appeals Chamber, six in the Trial Chamber and two in the Pre-Trial Chambers. He would

prefer to retain the full text of paragraph 3 (a) of article 37 and delete the square brackets. Qualifications should include criminal law or trial experience, together with professional competence in international law. Both (i) and (ii) in paragraph 3 (b) were necessary therefore, but some drafting changes might be useful to harmonize them. He preferred option 2 for paragraph 4; the Nominating Committee would also assess the requirements under paragraph 8, which should be retained in its entirety. Appeals judges should not serve in the Trial or Pre-Trial Chambers, but judges in the Trial and Pre-Trial Chambers could rotate. With regard to paragraph 10, either a term of five years with the possibility of re-election or single, staggered terms of nine years would be acceptable. In article 35 (b), he would prefer "Pre-Trial Chambers".

77. **Ms. WONG** (New Zealand) said that, to ensure the independence and effectiveness of the Court, the judges should be persons of high character, independence, impartiality and integrity, with recognized competence in international or criminal law and fluency in one of the working languages. She was also in favour of the principal legal systems of the world being represented, but not the main forms of civilization. She supported equitable geographical distribution and gender balance. Women were currently under-represented on international judicial bodies. The words "take into account the need for" should be retained in the *chapeau* of paragraph 8. Paragraph 8 (e) was important and should be retained, but the words "violence against children" should be replaced by "protection of children". The requirement in paragraph 3 (b) (i) for ten years' criminal law or trial experience would be too much if women were to be given due consideration as judges.

78. The reference to an "interested State" in paragraph 3 of article 42 was unacceptable.

79. **Mr. ASSHAIBANI** (Yemen) said that he was in favour of one trial chamber in article 35 (b), and in relation to article 36 endorsed the comments by the United Kingdom that judges should work on a full-time basis to guarantee their independence. With regard to judges' qualifications, practical experience was more important than academic qualifications. With regard to paragraph 8 of article 37, he emphasized the need for the representation of the principal legal systems and equitable geographical distribution.

80. Regarding paragraph 10, his delegation supported the proposal for a non-renewable nine-year term of office, on the understanding that a judge would be able to continue in office to complete a case. With regard to article 51, his delegation supported the proposal contained in document A/CONF.183/C.1/L.16, which should be discussed before referral to the Drafting Committee.

81. **Ms. MAKELA** (Finland) said that as far as paragraph 3 of article 37 was concerned, judges should be persons of high moral character and impartiality and have extensive criminal trial experience or recognized competence in international law, in particular international humanitarian law and human rights law. While criminal trial experience would be important for the Trial Chamber and Pre-Trial Chamber, those Chambers would also need judges with competence in international law. That requirement was even more important for judges of the Appeals Chamber.

82. In paragraph 8, she was strongly in favour of subparagraphs (d) and (e) being taken into account in the election of judges. The square brackets should be deleted. She was also in favour of having an age limit for judges, but was flexible as to what that limit should be. There should be small chambers, with five judges in the Appeals Chamber, three in the Trial Chamber and perhaps only one at the pre-trial level. That arrangement could be supplemented by a system of alternate judges. If the chambers were any larger, the number of situations in which judges would need to be disqualified might increase, which would hamper the functioning of the Court.

83. **Ms. DASKALOPOULOU-LIVADA** (Greece) said that, in paragraph 35 (b), she was in favour of providing for one or more pre-trial chambers, and in article 36 she would prefer judges working on a full-time basis. In

paragraph 2 (a) of article 37, the President acting on behalf of the Court should be able to propose an increase, but not a decrease, in the number of judges. In paragraph 2 (b), she favoured a simple majority. Paragraph 3 (a) was of paramount importance. Paragraph 3 (b) should provide for "extensive" experience rather than "at least ten years", which was too rigid. Criminal trial experience should be sufficient. Recognized competence in international law should also be sufficient without further specification. Greece had as yet no clear position as to whether (i) and (ii) of paragraph 3 (b) should apply cumulatively, because that would be desirable but would not be feasible in most cases. She favoured option 1 for paragraph 4, with reference to "each State Party". In paragraph 5, she would prefer a two-thirds majority of States parties. The original number of judges should be 17 or 18. With regard to paragraph 8, she agreed with the Coordinator's suggestion that the phrase "bear in mind" should be used in the *chapeau*, and was flexible as to the retention of subparagraphs (d) and (e). In paragraph 10, she supported a non-renewable nine-year term of office. The last sentence of paragraph 1 of article 40 was inappropriate.

84. **Ms. BERGMAN** (Sweden) said that the organization of the Court was a task for the Court itself and could not be covered in detail in the Statute. She was in favour of a flexible solution in respect of the qualifications of judges, so that the Court as a whole, rather than each and every judge, would have a variety of skills and experience. Gender balance was particularly important. It should be left to the Presidency of the Court to ensure that chambers had judges with the requisite qualifications. The Pre-Trial Chamber and Trial Chamber should consist of three judges each, and the Appeals Chamber should have five judges. It should be possible to expand the Chambers by one or more judges if, for example, a long trial was anticipated. The proposal for a screening process to ensure the election of the best available judges worldwide was an interesting one. However, such a system would need to be transparent. Judges should hold office for a non-renewable period of nine years.

85. **Mr. MAHMOOD** (Pakistan) said that the reference in article 35 (b) should be to one Pre-Trial Chamber. In article 36, to minimize the financial implications, the Pre-Trial Chamber should only be established on a permanent basis once the Court was seized of a matter. States parties should decide by a two-thirds majority whether judges should serve on a full-time basis.

86. In Article 37, paragraph 2 (b), he favoured "a two-thirds majority of States Parties" without the words "present and voting at that meeting". He endorsed the views expressed by the representative of China on paragraph 8.

87. With regard to article 40, the Appeals Chamber should consist of five judges, the Trial Chamber of three judges and the Pre-Trial Chamber of one judge. The numbers should be kept to the minimum to ensure the efficiency of the Chambers and minimize expenditure.

88. **Mr. BAZEL** (Afghanistan) said that, in article 35 (b), he preferred "Trial Chambers" and "Pre-Trial Chambers". Judges should serve on a full-time basis under article 36. In paragraph 2 of article 37, he favoured the expression "acting on behalf of the Court". He shared the views of the representative of France on paragraph 3 (b). In paragraph 5, he favoured the election of judges by a two-thirds majority. In paragraph 8, only subparagraphs (a), (c) and (e) should be retained, the latter being amended by an additional sentence reading: "The expert on issues related to sexual and gender violence and violence against children should be a woman." In paragraph 10, he supported a nine-year term of office.

89. **Ms. DIOP** (Senegal) said that, among the articles that the Coordinator had suggested should be referred to the Drafting Committee, article 51 should only be referred to the Drafting Committee if accompanied by the proposal contained in document A/CONF.183/C.1/L.16.

90. She was in favour of a pre-trial chamber under article 35. The independence and impartiality of judges would best be assured if they served on a full-time basis, which would also ensure that conflicts of interest did not arise.

91. In paragraph 2 (a) of article 37, she was in favour of "the President acting on behalf of the Court" but was prepared to be flexible regarding the bracketed words "as well as any State Party". Paragraph 3 was satisfactory, but the drafting could be made clearer.

92. With regard to paragraph 8, and particularly subparagraphs (d) and (e), it was high time for discrimination against women in the legal field to cease and for a proper gender balance to be established. There were women with the high qualifications required. The International Criminal Tribunals for Rwanda and the Former Yugoslavia had been hampered by the lack of judges with experience in regard to violence against women, rape or discrimination against women. A woman who had been raped would naturally find it easier to talk about her experience to another woman. She appealed to all delegations to be as objective as possible in that regard.

93. Paragraph 9 should be deleted. She would prefer a nine-year, non-renewable term of office in paragraph 10.

94. **Mr. NATHAN** (Israel) said that article 35 (b) should provide for a trial chamber and pre-trial chambers to cover any need which might arise. Under article 36, judges should serve on a full-time basis to ensure their availability when needed and to be consistent with the nature of their office as judges of the Court.

95. Under paragraph 2 (a) of article 37, the President, acting on behalf of the Court, should be able to propose an increase or decrease in the number of judges according to the workload of the Court. Paragraph 3 (b) (i) should stipulate a specific minimum period of criminal trial experience as a judge, prosecutor or defending counsel or, as an alternative, recognized competence in international law. The number of judges needed with criminal law experience and the number with competence in international law should be specified. In addition to the formal qualifications of judges, it would be important to look into the actual experience and records of those offering their candidacy for the Court, a task which might be performed by a screening committee.

96. He preferred option 2 for paragraph 4. Under paragraph 5, the judges of the Court should be elected by secret ballot by a two-thirds majority of the States present and voting. The aim should be to eliminate political influence on the election of judges. In paragraph 8, subparagraphs (a), (c), (d) and (e) should be kept and subparagraph (b), which referred to a rather antiquated concept, should be deleted.

97. Article 40 should ensure that there was no rotation of judges between Appeals and Trial Chambers. Judges sitting in the Trial Chamber or Appeals Chamber would not be interchangeable. However, judges in the Trial Chamber might be eligible to serve in the Pre-Trial Chamber.

98. **Mr. AL AWADI** (United Arab Emirates) said that article 35 (b) should provide for pre-trial chambers which would be used when necessary and thus avoid the need to amend the Statute at a later stage. In article 36, he was in favour of judges serving on a full-time basis. In paragraph 2 (a) of article 37, the President should act only on behalf of the Court. Paragraph 3 (a) should be retained as it stood with the deletion of the square brackets and paragraph 3 (b) should stipulate both criminal law and trial experience. That did not mean that judges need not have additional qualifications. Under paragraph 4, each State party should have the right to submit nominations. In paragraph 5, judges should be elected by secret ballot by a two-thirds majority of States parties present and voting, and two thirds of the States parties should constitute a quorum.

99. In paragraph 8, only subparagraphs (a) and (c) should be retained; that did not mean that the Court would not have access to the necessary expertise on questions of sexual or gender violence. In paragraph 10, judges should remain in office for nine years but not be eligible for re-election.

100. With regard to article 40, the Appeals Chamber should consist of seven judges, with five in the Trial Chamber and three in the Pre-Trial Chamber.

101. Regarding the articles to be referred to the Drafting Committee, article 51 should be referred to the Drafting Committee only if the Committee of the Whole accepted the proposal in document A/CONF.183/C.1/L.16.

102. Mr. CORELL (Representative of the Secretary-General), referring first to the Appeals Chamber, said that, as the rules stood, judges would be able to circulate between the Appeals Chamber and the Trial Chambers. That system functioned well at the national level, but would not be appropriate in the context of the International Criminal Court. It was important to bear in mind that judges rotating from the Trial Chambers to the Appeals Chamber would be disqualified except in very special circumstances.

103. With regard to the Trial Chambers, care should be taken to ensure that the Presidency had the necessary flexibility to ensure the smooth running of the Court. Rotation was important in any court and would be particularly important in the International Criminal Court provided that it was not tied strictly to dates.

104. At the pre-trial level, the Statute currently provided that the only task of the Pre-Trial Chambers would be to examine the pre-trial situation. That would disqualify all pre-trial judges rotating to the Trial Chambers.

105. It was important to bear those situations in mind in considering the total number of judges for the Court and the appropriate wording for the rules.

The meeting rose at 13.15 p.m.

UNITED NATIONS

United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

Rome, Italy
15 June-17 July 1998

Distr.
GENERAL

A/CONF.183/C.1/SR.15
20 November 1998

ORIGINAL: ENGLISH

COMMITTEE OF THE WHOLE

SUMMARY RECORD OF THE 15th MEETING

Held at the Headquarters of the Food and Agriculture Organization of the United Nations on Wednesday, 24 June 1998, at 3 p.m.

Chairman: Mr. P. KIRSCH (Canada)

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The meeting was called to order at 3.10 p.m.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (*continued*) (A/CONF.183/2/Add.1 and Corr.1)

Part 4 of the draft Statute (*continued*)

1. **The CHAIRMAN** said that, in the light of the discussions at the previous meeting, it might be useful to hold informal consultations on four of the provisions that the Coordinator had suggested could be referred to the Drafting Committee, namely article 39, paragraph 3 (a), article 45, paragraph 3, article 48 and article 51.

2. He invited the Committee to continue its consideration of the cluster of articles that it had taken up at the previous meeting ("cluster 1"): articles 35, 36, 37 and 40.

3. **Ms. PAVLIKOVSKA** (Ukraine) said that she was fairly flexible about paragraph 2 of article 37, provided that the principle of equitable geographical distribution set out in paragraph 8 (c) was taken into account. Regarding paragraph 1 of article 37, equitable geographical distribution would have a direct impact on States' trust in the judges. The number of judges should not be less than 18. That would allow at least two judges from each geographical group.

4. **Mr. Young-wook CHUN** (Republic of Korea) said that he favoured a single pre-trial chamber in article 35. Regarding article 36, the problem of full-time versus part-time judges was a financial matter, and should be decided on by States parties depending on the workload. On the qualifications of judges under article 37, all judges should be experienced in criminal law, have an understanding of different cultures and legal systems and be in a position to take into account the circumstances of each criminal. Equitable geographical distribution, therefore, deserved serious consideration. If election through a nominating committee or screening process was adopted, there would be a problem as to who would assess the qualification of a nominee and the standard applied. He therefore supported option 1 in article 37. Although he was flexible on the issue, he would prefer one or three judges in a pre-trial chamber, three judges in a trial chamber and five judges in an appeals chamber.

5. **Mr. AGBETOMEY** (Togo), referring to article 35, said that he favoured a plurality of pre-trial chambers. As for article 36, a permanent court would require full-time judges to make it effective. The number of judges to be provided for in article 37 would depend on the number of chambers and the number of judges in each. The judges must be highly qualified and of high moral character. He questioned the provision in paragraph 6 that "no two judges may be nationals of the same State", since competence should take precedence over nationality. In paragraph 10 of article 37, he would opt for a mandate of five years, renewable once. Age would then not be a problem.

6. **Mr. SALINAS** (Chile) said that there should be pre-trial chambers, trial chambers and appeals chambers. He was flexible on article 36, but thought it desirable that the Court be composed of full-time judges. He agreed on the need in article 37 to heed geographical factors and budgetary limitations. An appropriate number of judges would be about seventeen, sufficient to allow a balance between experience in criminal law, public international law and international humanitarian law. In paragraph 4, he favoured option 1. In paragraph 5, he supported the election of judges by a two-thirds majority of States parties. As to paragraph 8, he agreed with subparagraphs (a), (c), (d) and

/...

(e). With regard to (e), the link with article 5, concerning crimes against humanity, especially gender crimes, should be taken into account. Paragraph 9 could be deleted because no age limit was needed.

7. **Mr. MONETTI** (Italy) said that a pre-trial chamber or chambers was essential and could be composed of a single judge. Rotation was possible, although a judge could not sit in the Pre-Trial Chamber and a second chamber in the same case. In article 36, the second sentence, in square brackets, should be deleted. He would like to see an article containing criteria for assigning judges to chambers, to control the authority given to the Presidency. Judges should be elected by an absolute majority vote of the Assembly of States Parties on the basis of their expertise and experience. A checklist of requirements should be drawn up and sent to States to assist them in assessing candidates' qualifications. The judge's term of office should not be renewable, because the wish of a judge to be confirmed in his office might influence his decisions.

8. **Mr. Sayyid Said Hilal AL-BUSAIDY** (Oman) said that the references to appeals, trial and pre-trial chambers in article 35 (b) should be deleted. The President or the Court should determine the number of chambers required. Article 36 should provide for full-time judges, to guarantee impartiality. As to article 37, he agreed that competence and high moral character were essential qualifications for judges, and he had no difficulty in accepting paragraph 3 (b) (ii), concerning recognized competence in international law, criminal law, international humanitarian law and human rights law. Election of judges, under paragraph 5, should require a two-thirds majority vote of the Assembly of States Parties. In paragraph 8, he favoured the inclusion of subparagraphs (a), (b), (c) and (d), on representation of the main legal systems and forms of civilization in the world, equitable geographical distribution and gender balance. Subparagraph (e) was unnecessary. He had no objection to paragraph 9. In paragraph 10, he would prefer a nine-year non-renewable term of office. As proposed in the second sentence, one third of those elected at the first election could serve for three years, one third for six years and the rest for nine years. The Pre-Trial Chamber should have five members.

9. **Mr. KESSEL** (Canada) supported article 37, paragraph 8 (d), and said that gender balance was one important factor to be taken into account in the nomination process. The Platform for Action adopted by the Beijing World Conference on Women, in its paragraph 142, called on Governments to aim for gender balance when nominating or promoting candidates for judicial and other positions in international bodies such as the United Nations International Tribunals for the Former Yugoslavia and Rwanda. The experience of those Tribunals had demonstrated the benefit of expertise in issues related to sexual and gender violence.

10. **Mr. SHARIAT BAGHERI** (Islamic Republic of Iran) agreed with article 37, paragraph 3, on qualifications of judges. A combination of extensive experience of criminal law and competence in international law was necessary. He agreed with paragraphs 1 and 2 of article 37, without the bracketed reference to geographical distribution in paragraph 1, because that was covered in paragraph 8. As to paragraph 4, he supported option 1, with the term "State Party" and without the reference to national groups. The last sentence should be deleted.

11. In paragraph 8, he supported subparagraphs (a) and (c). The other subparagraphs had drawbacks. The very notion of gender balance was based on discrimination between the sexes and the term gave rise to difficulties of understanding and interpretation. He also wondered why, in subparagraph (e), there was a need to mention specialists in sexual and similar forms of violence; why not also specialists in crimes such as torture, etc.?

12. On articles 35 and 40, he favoured a pre-trial chamber with three judges, two trial chambers with five judges each and an appeals chamber with seven judges. The judges should be elected for a five-year term, non-renewable, so that they would not be influenced by political considerations.

13. **Mr. AL ANSARI** (Kuwait) said that article 35 should provide for a single, permanent pre-trial chamber. Judges should be full-time under article 36. The number of judges should take into account the requirements of article 37, paragraph 8. In article 37, paragraph 2 (a), the text in the first set of square brackets should be deleted, since in acting on behalf of the Court the President would be acting on behalf of all States parties. The text in square brackets in paragraph 3 (a) should be kept. As to paragraph 3 (b), the judges should have at least 10 years' criminal trial experience. In paragraph 4, he was in favour of option 1 and the wording "State Party". Election, under paragraph 5, should be by a two-thirds majority. He did not agree on the need for the age limit in paragraph 9. Paragraph 10 should provide for a single term of nine years. Concerning article 40, paragraph 1, the Appeals Chamber should be composed of five judges and the last sentence should be retained.

14. **Ms. STEAINS** (Australia) saw merit in including the words "extensive criminal law experience" in article 37, paragraph 3 (b). The requirement for 10 years' experience was unnecessary. She also recognized the importance of competence in international law within the membership of the Court. The composition of the different chambers should reflect the nature of the responsibilities of each, judges with criminal law experience predominating in the Pre-Trial and Trial Chambers and a balance of judges with international law and criminal law experience in the Appeals Chamber. In paragraph 8, she preferred the formulation "take into account the need for" to the weaker "bear in mind". Subparagraph (b) should be deleted because the concept was outmoded. She supported the inclusion of references to representation of the principal legal systems of the world and to equitable geographical distribution.

15. She strongly endorsed the need for gender balance, as well as expertise on issues relating to sexual and gender violence, and violence against children, within the membership of the Court. Women and children were often the victims of the crimes which would fall within its jurisdiction.

16. **Mr. MOURID** (Morocco), referring to article 35, said that the Court could be limited to an appeals chamber, a trial chamber and a pre-trial chamber. Each chamber could set up additional chambers where the caseload so required. The full-time appointment of judges would allow them to discharge their functions properly, free from outside influence. He was flexible on paragraph 1 of article 37, but there should be a minimum number of judges. In paragraph 4, he preferred option 1. In paragraph 5, he would prefer election by a two-thirds majority of States parties. Paragraph 8 should read "States Parties shall take into account", followed by the list of criteria. He favoured subparagraph (a) concerning representation of the principal legal systems of the world and subparagraph (c) on equitable geographical distribution. On the question of working languages, article 51, paragraph 2, should be retained in the interests of ensuring justice.

17. **Mr. DA COSTA LOBO** (Portugal) said that in principle, in article 35, he favoured "Pre-Trial Chambers" in the plural. As to article 36, judges should serve on a full-time basis. Article 37 was undoubtedly one of the most important. He saw expertise in criminal law and in international law as alternatives. In that connection, he was very much in sympathy with the suggestion for a screening mechanism between nomination and election. That would give States better information on individual judges and would make it easier to consider the composition of the Court as a whole. The election itself should be by absolute majority in a secret ballot. The Appeals Chamber and Trial Chamber should have at least five judges each.

18. **Mr. NIYOMRERKS** (Thailand) thought that provision should be made for more than one Pre-Trial Chamber in article 35. Under article 36, full-time judges could serve alternately on a rotational basis in the Pre-Trial and Trial Chamber, but should serve in only one Chamber at a given time. In article 37, paragraph 2 (a), he would prefer the deletion of all the brackets. Under paragraph 3 (b), judges should have criminal law experience as well as competence in international law, international humanitarian law and human rights law. Under paragraph 4, States

parties and not national groups should nominate judges, and they should be elected by a two-thirds majority vote of the Assembly of States Parties. He supported paragraph 8, including the references to gender balance and special expertise.

19. Under article 40, paragraph 3, the Presidency should assign judges to trial and pre-trial chambers in accordance with the Rules of Procedure and Evidence. He would prefer a small number of judges in each chamber, and was flexible on the term of office.

20. **Ms. SHAHEN** (Libyan Arab Jamahiriya) said that her position was flexible as to whether, in article 35 (b), there should be a separate pre-trial chamber or not. Under article 36, the judges should carry out their functions on a full-time basis. Under article 37, she would prefer there to be 18 judges. In paragraph 4, she supported option 1, with the use of the expression "State Party". Under paragraph 5, the judges of the Court should be elected by a two-thirds majority vote of the Assembly of States Parties. As for paragraph 8, she agreed with subparagraphs (a) concerning the representation of the principal legal systems of the world, (c) on equitable geographical distribution and (d) on gender balance. Subparagraph (e) was not essential, because expertise would be required in all areas covered by the Court. Under paragraph 10, judges should be appointed for a nine-year term.

21. The general rule for article 40 should be that a judge could not be a member of more than one chamber.

22. **Mr. MORSHED** (Bangladesh) said that the functions contemplated in draft article 13 should be performed by a pre-trial chamber, its composition based on the principle of equitable geographical representation and reflecting the major legal systems of the world.

23. **Mr. SOH** (Cameroon) supported a single pre-trial chamber in article 35. An independent and impartial court required full-time judges, who should have high intellectual and moral qualities and professional competence in both criminal law and international humanitarian law. They should be elected by States parties by a two-thirds majority, taking into account the provisions of subparagraphs 8 (a), (b), (c) and (e) of paragraph 8. He favoured a nine-year, non-renewable term for judges. The number should be the strict minimum necessary for the smooth functioning of the Court.

24. **Mr. KIFLI** (Brunei Darussalam) had no objection to article 37, paragraph 8 (e), on the need for expertise on issues related to sexual and gender violence. He agreed that, under paragraph 9, judges should not be over the age of 65 at the time of election. Regarding paragraph 10, he would prefer judges to hold office for a non-renewable term of nine years.

25. **Mr. KAM** (Burkina Faso) said that he was in favour of the professional qualification requirements for judges in article 37, but that they should be alternatives. As for paragraph 8, the election of judges should take account of the principal legal systems of the world and equitable geographical distribution, but not the aspects mentioned in subparagraphs (d) and (e). The term of office should be at least nine years, but non-renewable. The number of judges would vary depending on the Court's caseload.

26. **Mr. AL ADHAMI** (Iraq) supported a single pre-trial chamber. Under article 36, judges should serve on a full-time basis to guarantee their impartiality and independence. In article 37, paragraph 4, he supported option 1 and nomination by States parties. Under paragraph 5, judges should be elected by secret ballot by a two-thirds majority of States parties present and voting, and the quorum should be one half of the States parties. In paragraph 8, the representation of the principal legal systems of the world, equitable geographical distribution and gender balance

were valid criteria. He supported paragraph 9. Under paragraph 10, judges should be elected for a term of five years, renewable for one term.

27. Under article 40, the Appeals Chamber should be made up of five judges.

28. **Mr. FORTUNA** (Mozambique) supported several trial chambers in article 35 (b). In article 36, he supported full-time judges. The main qualification for judges, in article 37, should be long experience of criminal trials, followed by a background in international criminal law or human rights. Regarding paragraph 4 of article 37, he preferred option 2. He supported paragraphs 5, 6 and 7. In paragraph 8, he would prefer to delete subparagraph (b). In paragraph 9, he supported an age limit of 65 to encourage participation by younger people. Under paragraph 10, a three-year term would allow greater rotation. Finally, in article 40, the minimum composition of the Appeals Chamber should be three judges.

29. **Ms. LA HAYE** (Bosnia and Herzegovina) said that the reference to geographical distribution in the bracketed text to article 37, paragraph 1, might not be sufficient. Consideration should be given to the different cultural and legal traditions within each geographical area. She therefore proposed that, in article 37, paragraph 1, the phrase "and appropriate consideration shall be given to cultural and legal traditions" should be added at the end of the sentence in square brackets, and that a new subparagraph (c) *bis*, "appropriate representation of different cultural and legal traditions", should be added to paragraph 8.

30. **Ms. RWAMO** (Burundi) said that the principle of equitable geographical distribution was essential in recruiting judges with a balance of viewpoints. She was in favour of a non-renewable nine-year term. Article 37, paragraph 8 (e), calling for the inclusion among the judges of experts in sexual and gender violence, should be maintained. She firmly supported subparagraph (d) on gender balance; experience in many countries had already shown the effectiveness of women judges.

31. **Mr. KERMA** (Algeria) said that the Court should have at least one Pre-trial Chamber. Under article 36, full-time judges would facilitate the smooth operation of the Court, but the availability of financial resources must be taken into account. Under article 37, the total number of judges would depend on the composition of each chamber, but should not be less than 17. It should be for the Assembly of States Parties to elect the judges. There was no need to specify the number of years of experience, but judges must have expertise in criminal law and international law. Regarding paragraph 4, he favoured option 1, with the expression "State Party". He had no special problems with the content of paragraph 8, but emphasized representation of the main legal systems of the world and the principle of equitable geographical distribution. Paragraph 9 was acceptable. For paragraph 10, a non-renewable nine-year term seemed the most reasonable. He was in favour of the idea in paragraph 11.

32. **Mr. PEREZ OTERMIN** (Uruguay) said that article 35 (b) and article 36 required a flexible approach, since the eventual workload was unknown. Initially, at least, judges should serve on a full-time basis, after which the position should be reviewed. The qualification requirements in article 37, paragraph 3 (b), should not be cumulative, but the qualifications of the judges collectively must encompass criminal trial experience and international law. The requirement in subparagraph (c) relating to working languages was perhaps excessive; that should be regarded as a secondary matter.

33. The election of judges also required a flexible approach. Initially judges should be elected by the United Nations General Assembly. Only later should the Assembly of States Parties elect them.

34. **Mr. ADDO** (Ghana) favoured a single pre-trial chamber. An appeals chamber was essential. Article 36 should provide for full-time judges, and they should be 21 in number. The judges must have both criminal trial experience and competence in international law. The existing mechanisms for election in the United Nations system could be used to elect the judges of the Court.

35. He agreed with the provisions in article 37, paragraph 8, on the representation of the principal legal systems, equitable geographical distribution and gender balance but favoured the deletion of subparagraph (b), "the representation of the main forms of civilization".

36. **Ms. RAMOUTAR** (Trinidad and Tobago), supported by **Mr. McCOOK** (Jamaica), said that the Pre-Trial Chamber in article 35 was necessary to ensure the performance of important functions described elsewhere in the Statute. A single Pre-Trial Chamber should be established in the first instance and, as and when necessary, additional chambers could be established by the Court itself.

37. Article 37 should provide for highly qualified judges with criminal trial experience and knowledge of international law. She was not in favour of the screening process proposed for nomination of candidates, which might open the door to political and other influences. She preferred nomination by States parties.

38. **Mr. PANIN** (Russian Federation) said that a single pre-trial chamber would be preferable, but the volume of work might require additional pre-trial chambers. Only the judges making up the Presidency should be full-time. The remainder could be convened by the Presidency as required. They must be highly experienced and well qualified in criminal law and have recognized competence in international law. A proper balance must be struck. In a trial chamber, priority might perhaps be given to judges with experience in criminal justice.

39. With reference to paragraph 4 of article 37, candidates should be nominated by States parties and the judges should be elected by the Assembly of States Parties by a two-thirds majority for a term of nine years. That would help to ensure the greatest possible independence on the part of the judges.

40. Rotation might be possible between Trial and Pre-Trial Chambers, but not with the Appeals Chamber.

41. In electing judges, the Assembly of States Parties should take into account the need for representation of the principal legal systems of the world and equitable geographical distribution. The other elements of paragraph 8 of article 37 had no bearing on ensuring an impartial criminal justice system.

42. **Ms. TOMIČ** (Slovenia) strongly supported article 37, paragraph 8, subparagraphs (d) and (e).

43. **Mr. MANIWA** (Democratic Republic of the Congo) said that judges required above all a high moral character and technical competence. The principal legal systems should be represented. Equitable geographical distribution was needed. The reference to the main forms of civilization could be deleted, and a mathematical gender balance would be unnecessary.

44. **The CHAIRMAN** recalled what he had said at the beginning of the meeting. It was his understanding that the following provisions could be referred to the Drafting Committee: article 35, paragraphs (a), (c) and (d); article 39, paragraphs 1 and 2; article 41; article 45, paragraphs 1 and 2; article 46; and article 50. Article 39, paragraph 3 (a), article 45, paragraph 3, and articles 48 and 51 would be the subject of informal consultations.

45. *It was so decided.*

46. **The CHAIRMAN** invited the Coordinator for Part 4 to introduce "cluster 2": article 38; article 39, paragraphs 3 (b) and 4; articles 42 to 44; article 45, paragraph 4; and articles 47, 49, 52 and 53.

47. **Mr. RWELAMIRA** (South Africa), Coordinator for Part 4, said that there did not seem to be any major problems with paragraph 1 of article 38. There might be a need to consider paragraph 2, the issue being whether a judge elected to fill a judicial vacancy should be eligible for re-election after completing his or her predecessor's term, or whether that should be dependent on the period of the term remaining.

48. Article 39, paragraph 4, raised a matter of principle regarding the exact relationship between the Presidency and the Prosecutor.

49. Article 42 dealt with the excusing and disqualification of judges. It might be best to leave the situation envisaged in paragraph 1 to be governed by the internal rules of the Court. He would therefore suggest that the second of the bracketed alternatives in paragraph 1 should be used. The issue raised in paragraph 2 was whether nationality should be a ground for disqualification and, if so, the scope of application of that principle. In paragraph 3, the question was who had the right to request the disqualification of a judge, and whether that right should be extended to an interested State. In view of the indeterminate nature of the term "interested State", it might be useful to confine that right to the Prosecutor and the accused, but that should be discussed.

50. He suggested that the issue of the ex officio powers of the Prosecutor in paragraph 1 of article 43 be deferred until the formulation in article 12 and other articles related to the trigger mechanism was settled. The issue in paragraph 2 seemed largely to depend on the discussion of article 47, concerning removal from office. Another important issue was whether the Prosecutor and the Deputy Prosecutor or Prosecutors should serve on a full-time or a part-time basis.

51. Paragraph 3 of article 43 raised an issue regarding skills and qualifications, namely whether the Prosecutor and the Deputy Prosecutor should have trial or prosecution experience. In order to allow flexibility, it might be desirable to opt for the expression "extensive experience" rather than specify a number of years.

52. In paragraph 4 of article 43, one proposal was that the Deputy Prosecutor should be appointed by the Prosecutor. That was related to the proposal in article 47, paragraph 2 (c), that the Prosecutor should be able to remove the Deputy Prosecutor from office. Those issues might need discussion.

53. Paragraph 7 of article 43 dealt with disqualification. The question of the relevance of nationality should probably be considered in conjunction with the issue raised in article 42, paragraph 2. A related issue was whether disqualification should be decided on by the Presidency, the Appeals Chamber or the judges of the Court.

54. Paragraph 9, in square brackets, provided that the Prosecutor should appoint advisers with expertise on specific issues such as gender violence. One solution might be to include that particular provision in the Rules of Procedure and Evidence rather than in the Statute.

55. Paragraph 10 would provide for the protection of witnesses called by the prosecution, and for the inclusion in the Prosecutor's staff of people with expertise in trauma and matters related to sexual violence. The issue might better be considered under article 44, paragraph 4, which would establish a "Victims and Witnesses Unit".

56. Under article 44 itself, issues that arose were whether the States parties or the judges should elect the Registrar, what majority would be required and whether the Deputy Registrar should be elected or appointed.

Paragraph 4 raised issues also covered by article 68, paragraph 5, in Part 6 of the draft Statute. The question of the proper location of the paragraph, if it was included, might have to be considered.

57. Article 45, paragraph 4, allowing personnel seconded from States and organizations to assist in the work of organs of the Court, was controversial.

58. With regard to article 47, an issue that arose was whether it should be possible for the Deputy Prosecutor to be removed from office by the Prosecutor or only by the States parties. Paragraph 3 raised the issue whether the rights of those whose conduct was challenged should be governed by the Rules of Procedure and Evidence or the Regulations of the Court. As such matters were central to the functioning of the Court, he suggested that the Committee might consider whether they should not be governed by the Rules of Procedure and Evidence.

59. Article 52 dealt with the Rules of Procedure and Evidence and raised the question whether they should be an integral part of the Statute and annexed to it, as provided for in option 1 for paragraph 1. That would have implications for ratification and possibly also for signature. Option 2 was much more flexible. It provided merely that the Rules, which might possibly be adopted together with the Statute, should not be inconsistent with the Statute. In paragraph 2, the majority needed for the adoption of amendments to the Rules of Procedure and Evidence would need to be considered.

60. Finally, article 53, on the Regulations of the Court, raised three problems. The first issue was whether they should be adopted by a two-thirds or an absolute majority of the judges. The second issue concerned precedence in the case of a conflict between the Rules of Procedure and Evidence and the Regulations of the Court. The third issue related to the role of States parties in the elaboration of the Regulations.

61. **Mr. ADDO** (Ghana) said that he was satisfied with the thrust of article 42, and urged the removal of the brackets in paragraphs 2 and 3. The provisions of article 43 were adequate, but the functions in paragraph 10 would be better performed by the Office of the Registrar. He was not in favour of article 45, paragraph 4.

62. **Mr. McCOOK** (Jamaica) wished to see article 45, paragraph 4, deleted. The staff of the Court should be employed in accordance with its needs under the relevant provisions of the Statute. Staff should not be seconded from other bodies; concerns about so-called "gratis" personnel had been the subject of extensive discussions in other United Nations forums.

63. **Mr. DIVE** (Belgium) agreed to article 38, paragraph 2, and article 39, paragraph 4, *in toto* and proposed the deletion of the square brackets. In article 42, he was in favour of the first two paragraphs; he favoured the first bracketed alternative in paragraph 1 and the removal of the square brackets in paragraph 2.

64. In article 43, paragraph 1, the text in square brackets should be kept. He favoured keeping paragraph 9 and deleting paragraph 10. The rules on protection for witnesses should be a matter for the Registrar. He was therefore in favour of keeping paragraph 4 of article 44. The Registrar should be appointed by the judges, with a term of office of nine years, in line with that of the judges and the Prosecutor.

65. In article 45, he favoured keeping paragraph 4. The rules in article 47, paragraph 2, should be the same for the Deputy Prosecutor as the Prosecutor, and the first subparagraph (c) should be deleted.

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66. Under article 49, paragraph 1, there should be the same privileges and immunities for the judges, the Prosecutor, the Deputy Prosecutor, the Registrar and the Deputy Registrar. In paragraph 4, the first bracketed alternative in subparagraph (a) should be chosen, and subparagraph (b) should be deleted.

67. In article 52, he was in favour of option 2. The Rules of Procedure and Evidence should be adopted by a two-thirds majority of States present and voting in the Assembly of States Parties. There should be no link with the adoption of the Statute. The emergency procedure in paragraph 3 should also require a two-thirds majority.

68. As for article 53, paragraph 1, he was in favour of adoption of the Regulations by an absolute majority of judges, because if a two-thirds majority was not obtained the Court might have no regulations. The last sentence in brackets should be deleted.

69. **Mr. BELLO** (Nigeria) said he wished to point out that, if it was decided that judges should serve full-time, there would be no need for paragraph 3 of article 41.

70. Under article 43, both the Prosecutor and the Deputy Prosecutor should serve full-time and be elected by an absolute majority of the States parties. In paragraph 8, disqualification of the Prosecutor or the Deputy Prosecutor should be decided on by the Presidency.

71. In article 44, paragraph 2, the judges should, by an absolute majority, elect a Registrar and a Deputy Registrar. Paragraph 4 of that article should be moved to article 43. It was the Prosecutor who had direct contact with the victims and the witnesses and who should arrange for assistance to them.

72. Paragraph 4 of article 45 could be deleted. The issues concerned should be dealt with in Parts 9 and 10 of the Statute. Alternatively, that provision could be worded: "The Presidency or the Prosecutor may request the assistance of personnel from any State Party, intergovernmental or non-governmental organization, in the exercise of his functions under this Statute."

73. In article 47, paragraph 2, removal from office of both the Prosecutor and the Deputy Prosecutor should be decided on by a majority of the States parties. He agreed with the proposal for an additional article appearing in footnote 28 of document A/CONF.183/2/Add.1. In article 49, paragraphs 1 and 2 should be aligned so that the officers in question enjoyed the same diplomatic privileges and immunities in the exercise of their duties under the Statute.

74. **Mr. MATSUDA** (Japan) thought that the reference in article 42, paragraph 1, should be to the Regulations of the Court rather than the Rules of Procedure and Evidence, for the reasons given earlier by the Coordinator. Paragraph 2, on the grounds for the disqualification of judges, was very important in terms of the independence and the impartiality of the Court. The grounds for disqualification must be in the Statute itself rather than in the Rules of Procedure and Evidence. The bracketed language in that paragraph should be retained. In paragraph 3, only the Prosecutor or the accused should have the right to request the disqualification of a judge.

75. In article 49, paragraph 1, he supported diplomatic privileges and immunities for judges, the Prosecutor and Deputy Prosecutors, but the Registrar and the Deputy Registrar should come under paragraph 2. In paragraph 2, the privileges and immunities enjoyed should be in line with those of the staff of the United Nations. Paragraph 2 might therefore be amended so that the officials concerned would enjoy "such privileges and immunities as are accorded to officials of the United Nations under article 5 of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946". The first sentence of paragraph 3 was acceptable in principle but the

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reference to counsel and experts should be clarified. The second sentence was superfluous; it was not necessary to accord such immunities to counsel and witnesses. Their correct treatment was sufficiently ensured by the first sentence.

76. **Mr. PANIN** (Russian Federation) would prefer the deletion of paragraph 4 of article 39 and the reference to interested States in article 42, paragraph 3. In paragraph 4 of article 43, both the Prosecutor and the Deputy Prosecutor should be elected by the States parties. He had no objection to paragraphs 9 and 10 of that article being transferred to the Rules of Procedure and Evidence. In article 45, paragraph 4, he had doubts regarding personnel being detailed by non-governmental organizations. In article 47, he agreed with the formulation of paragraph 2 (a). The Deputy Prosecutor and the Registrar should be removed from office by a decision of the States parties. The Deputy Registrar could be removed by the judges.

77. Finally, the Rules of Procedure and Evidence should be an integral part of the Statute.

78. **Mr. NYASULU** (Malawi) said that article 38 would depend on whether article 37 provided for re-election of judges. A person replacing a judge whose term had not yet expired should enjoy the same eligibility for re-election as his predecessor. In article 39, paragraph 3, the President should have responsibility for administration of the Court, which would include supervision of the Registrar and staff, but the words in brackets should not be retained because they implied an undue restriction on the Registrar. The Court should be left to develop its own internal arrangements for effective implementation of the Statute.

79. In article 42, paragraph 1, the reference should be to the Regulations of the Court. In paragraph 2, whether nationality should be a ground for disqualification might depend on the circumstances of the particular case. In paragraph 3, a State should not be allowed to ask for the disqualification of a judge. The Court would be dealing with individuals, and the matter should be left to the individuals concerned or the Prosecutor.

80. In paragraph 2 of article 43, prosecutors should serve on a full-time basis. He would prefer "extensive ... experience" to "ten years ... experience" in paragraph 3. Both the Prosecutor and the Deputy Prosecutor should be elected by secret ballot by the Assembly of States Parties, to serve for nine years, non-renewable. There was no reason to restrict the age of the Prosecutor or Deputy Prosecutor. In paragraph 8, disqualification should be decided on by the judges of the Court. Paragraph 9 should be deleted. Paragraph 10 of article 43 should be dealt with under paragraph 4 of article 44, taking into account article 68. In article 44, paragraph 2, the judges should appoint the Registrar for a term of nine years.

81. **Mr. KROKHMAL** (Ukraine) said that article 42, paragraph 3, should include interested States because the case considered might have some impact on States. He agreed that article 45, paragraph 4, was superfluous. Article 49, paragraph 3, giving immunity to witnesses and experts, was important and must be retained. In article 52, he was in favour of option 1, on the assumption that the Rules of Procedure and Evidence would have equal legal value with the Statute.

82. **Mr. PEREZ OTERMIN** (Uruguay) said that paragraph 4 of article 45 should be deleted. The United Nations had experienced problems with staff on loan or on secondment, especially in peacekeeping operations, because they were not part of the regular staff. That mistake should not be repeated with the Court.

83. **Mr. AL AWADI** (United Arab Emirates), supported by **Mr. CHUKRI** (Syrian Arab Republic), said that, in article 38, paragraph 2, the term of office of a judge elected to fill a vacancy should not exceed the term of office

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of his predecessor. As for article 39, the square brackets in paragraph 3 (a) should be deleted. Paragraph 4 of that article should be retained.

84. In article 42, paragraph 1, the words in brackets should be replaced by "Regulations of the Court and their annexes". All the brackets in paragraph 2 should be deleted. In paragraph 3, the reference to an interested State should be deleted because States would not be party to the proceedings.

85. In article 43, paragraph 1, the term "complaints" should be deleted and the term "referrals" retained. In paragraph 2, the reference to different legal systems should be kept. In paragraph 4, the reference to the appointment of the Deputy Prosecutor should be deleted. The entire text of paragraph 7 should be retained.

86. Article 45, paragraph 4, should be dropped because it could have an adverse impact on the independence of the Court.

87. In article 47, paragraph 1, the words in square brackets should be replaced by the words "and its annexes". The subparagraphs of paragraph 2 could be replaced by words such as "by the body in which the person concerned discharged his or her functions". As for article 52, paragraph 1, he favoured option 2, with provision for a two-thirds majority, and the deletion of paragraph 3. In article 53, paragraph 1, an absolute majority should suffice for the adoption of the Regulations of the Court.

88. **Mr. EL MASRY** (Egypt), referring to article 43, thought that, to maintain a balance, the President of the Court and the Prosecutor should not have the same nationality or come from the same geographical group.

89. There could be objections to article 45, paragraph 4, since it could expose the Court to undesirable influence.

90. **Mr. QUINTANA** (Colombia) associated himself with everything said by the representatives of Jamaica and Uruguay on paragraph 4 of article 45, which should be deleted.

91. **Mr. NATHAN** (Israel) said that in article 42, paragraph 2, the material in square brackets should be kept because, in the situations described, there might be a conflict of interests. He opposed the inclusion in paragraph 3 of "an interested State"; the right in question should be limited to the Prosecutor and the accused.

92. The wording of article 43 on the Office of the Prosecutor might not be consistent with article 12. In paragraph 3, the qualifications of the Prosecutor and the Deputy Prosecutor should included 10 years' practical experience in the prosecution of criminal cases. Their term of office should be nine years, non-renewable.

93. Concerning paragraph 5, the Prosecutor and the Deputy Prosecutor should serve full-time and not engage in any other occupation of a professional nature; that would lead to a conflict of interests. The bracketed material in paragraph 7 should be retained.

94. The reference in article 47, paragraph 1, should be to the Regulations of the Court. In subparagraph (a) of paragraph 2, a two-thirds majority should be required, while in subparagraphs (b) and (c) an absolute majority would be sufficient.

95. In article 49, privileges and immunities should apply similarly to judges, Prosecutor, Deputy Prosecutor and Registrar. In paragraph 3, the immunity referred to in the second and third sentences was absolutely necessary for the proper functioning of the Court.

96. In article 53, it should be stated that the Regulations of the Court formed an integral part of the Statute, so that States parties signing the Statute would already be aware of the contents of the Regulations.

97. **Ms. TOMIČ** (Slovenia) supported the creation in article 44, paragraph 4, of a "Victims and Witnesses Unit" within the Registry. Only the Registry would be sufficiently neutral to provide that protection. The provisions would have to be harmonized with those of article 68, paragraph 5.

98. In article 52, she supported the proposal in option 2 that the Rules of Procedure and Evidence should enter into force upon adoption by the Assembly of States Parties, preferably by an absolute majority of those present and voting.

99. **Ms. BAJRAI** (Singapore) said that if nationality was to be specified as a ground for exclusion in paragraph 2 of article 42 and paragraph 7 of article 43, nationals of both the complainant State and the State on whose territory the offence was alleged to have been committed should be disqualified as judges, Prosecutors and Deputy Prosecutors.

100. **Mr. GRAMAJO** (Argentina) said that the text of article 42, paragraph 2, should remain as it stood and the square brackets should be removed. Concerning article 44, paragraph 4, the Victims and Witnesses Unit should come under the Secretariat of the Court or the Registrar of the Court, not the Prosecutor's Office. Article 43, paragraph 10, should be deleted.

101. **Ms. NAGEL BERGER** (Costa Rica), referring to paragraph 9 of article 43, said that there must be at least one adviser on gender violence in the Office of the Prosecutor. The United Nations General Assembly had acknowledged the importance of the problem of violence against women, yet there were still eminent jurists who did not understand that gender violence required special treatment.

102. **Mr. LAGEZE** (France) was in favour of deleting the words in brackets in article 39, paragraph 3 (a). Paragraph 4 could be replaced by a provision saying that, in performing its tasks under paragraph 3 (a), the Presidency would act in coordination with the Prosecutor.

103. In article 42, paragraph 1, he preferred the words "Regulations of the Court", and in paragraph 3 the reference to "an interested State" should be deleted. Only the Prosecutor or the accused should be able to request the disqualification of a judge.

104. In article 43, the Prosecutor and Deputy Prosecutors should be elected in the same way as judges and, to ensure their independence, for the same non-renewable term of nine years. They should exercise their functions on a full-time basis.

105. Regarding article 44, his preference, in the interests of proper management, would be for an arrangement which, while according a specific sphere of competence to the Registry, would place it under the Presidency.

106. The Rules of Procedure and Evidence, in article 52, should be adopted by the Assembly of States Parties by an absolute majority. They should be negotiated only after the adoption and signature of the Statute by the States concerned.

107. **Mr. MAHMOOD** (Pakistan), speaking on article 43, said that the Prosecutor should act only in cases referred to him by a State. Consequently, the bracketed words in paragraph 1 concerning information related to the alleged

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commission a crime should be deleted. The Prosecutor should be elected by the States parties by a two-thirds majority. The Deputy Prosecutor could be appointed by the Prosecutor, thus obviating any need for States parties to meet every time a Deputy Prosecutor was to be appointed. The Prosecutor and Deputy Prosecutor should hold office for a non-renewable term of seven years.

108. Under article 47, paragraph 2, subparagraph (a), the removal of a judge should be by a two-thirds majority of States parties. Under subparagraph (b), the removal of the Prosecutor should be by an absolute majority of States parties. Under subparagraph (c), if the Deputy Prosecutor was appointed by the Prosecutor he should be removed by the Prosecutor; otherwise, by a majority of States parties. The Registrar, if appointed by the Court, should be removed by a majority of judges or, if elected, by a majority of States parties. The Deputy Registrar, if appointed by the Registrar, should be removed by the Registrar or, if elected, by the States parties.

109. In article 52, he supported the adoption of the Rules of Procedure and Evidence by a two-thirds majority of States parties present and voting.

110. **Mr. YEPEZ MARTINEZ** (Venezuela) said that the bracketed text in article 38 should be retained. In article 39, paragraph 3, the bracketed text was acceptable except that it should be up to the Registrar, not the Presidency, to supervise secretariat staff.

111. All the brackets should be deleted from article 42, paragraph 2, article 43, paragraphs 1, 5 and 7, and article 44, paragraph 4. Article 45, paragraph 4, should be deleted. In article 52, he preferred option 2.

112. **Ms. VEGA** (Peru) said that in article 42, paragraph 3, only the Prosecutor or the accused should have the right to request the disqualification of a judge. That right should not be given to an interested State, which would not be a party to the process.

113. **Mr. SHARIAT BAGHERI** (Islamic Republic of Iran) accepted the text of article 38, paragraph 2, except the part in square brackets. He supported the entire text of article 39, paragraph 3, including the phrase in brackets. Paragraph 4 should be deleted.

114. In article 42, he agreed with paragraph 1 and with the entire text of paragraph 2. He could accept article 43 provided that it did not give the Prosecutor ex officio powers. In paragraph 4, the Prosecutor and Deputy Prosecutors should be elected by States parties.

115. In article 44, the Registrar should be elected by the Assembly of States Parties and elected for the same non-renewable term as judges. He was in favour of paragraph 4. In article 45, the phrase "or non-governmental organizations" should be deleted. In article 47, serious misconduct needed to be defined. Decisions to remove judges were very serious, and should be taken by a two-thirds majority of States parties on the recommendation of two thirds of the judges of the Court. In paragraph 2 (b), the text in brackets should be retained, and the first subparagraph (c) should be deleted. Removal of the Registrar or the Deputy Registrar should require a majority vote of the judges. He agreed with paragraph 3 of article 47, and with article 49. In article 52, he was in favour of option 1.

116. In article 53, he would keep the bracketed last sentence of paragraph 1. The Regulations of the Court should be adopted by a two-thirds majority of the judges. Paragraphs 2 and 3 were acceptable.

117. **Ms. SHAHEN** (Libyan Arab Jamahiriya) said that in article 43, paragraph 2, the brackets around the provision on the representation of different legal systems should be removed. In paragraph 4, the Prosecutor and Deputy Prosecutor should be elected by an absolute majority of the States parties. Article 45, paragraph 4, should be deleted.

118. **Ms. PIBALCHON** (Thailand) said that, in article 43, paragraph 4, the Prosecutor and Deputy Prosecutor should be elected by secret ballot by an absolute majority of States parties. The excusing and disqualification of the Prosecutor, dealt with in paragraphs 6 to 8, should be the subject of a separate article, in line with the excusing and disqualification of judges in article 42. Thirdly, she supported paragraph 9 of article 43 in principle, whether included in that article or in the Rules of Procedure and Evidence. She supported the establishment of the Victims and Witnesses Unit.

119. On article 49, the persons referred to in paragraph 3 should not remain immune once they had been discharged from their functions.

120. **Ms. RAMOUTAR** (Trinidad and Tobago) supported the general thrust of article 43, especially paragraph 3 on the qualifications of the Prosecutor, which should be consistent with those for judges in respect of criminal trial experience. The Deputy Prosecutor should be elected in the same manner as the Prosecutor. The Registrar should be elected by the judges for a term of five years, renewable only once. The Registrar should be under the authority of the President. The judges, the Prosecutor, the Deputy Prosecutor, the Registrar and the Deputy Registrar should enjoy diplomatic privileges and immunities. The words in square brackets in article 49, "when engaged in the business of the Court", should be deleted, as those officers should enjoy such privileges and immunities at all times so that they could perform their functions independently.

121. In article 39, paragraph 3 (a), the text in square brackets could be deleted, as that idea was contained in the term "due administration of the Court". The Victims and Witnesses Unit should be established in the Registry of the Court, since victims or witnesses might be required to testify for either the prosecution or the defence.

122. **Mr. FORTUNA** (Mozambique) agreed with paragraphs 1 and 2 of article 42. With regard to paragraph 3, neither the Prosecutor nor an interested State should have the right to take action on the removal of judges. Regarding article 43, paragraph 4, the age limit for appointment as Prosecutor should be lowered. He agreed with the election of the Registrar by secret ballot by the judges under article 44, paragraph 2. In article 45, paragraph 1, the President of the Court should appoint the staff of the Registry. In article 49, the President of the Court should be the one to waive the privileges or immunities of the Registrar, Deputy Registrar and staff of the Registry.

123. **Ms. LI Ting** (China) said that, in article 43, paragraph 4, the Deputy Prosecutor, like the Prosecutor, should be elected by the States parties. Article 45, paragraph 4, should be deleted. In article 49, paragraph 3, she suggested the deletion of the text in brackets. In article 52, paragraph 1, she could accept option 2, but the legal status of the Rules should remain as under option 1. She was flexible on article 52, paragraph 3, but any decision taken should be by a two-thirds majority.

124. **Ms. JOYCE** (United States of America) stressed the need for cohesion in the Prosecutor's Office and also with respect to the Court as a whole. Election by States parties of the Deputy Prosecutor and the Registrar would be tantamount to giving them a separate power base. That would undermine the control of the Prosecutor over his or her Office and possibly the ability of the judges to keep the Registrar in check. The Deputy Prosecutor should be appointed by the Prosecutor and the Registrar by the judges.

125. **Mr. MANIWA** (Democratic Republic of the Congo) said that the reference to a three-year period in article 38, paragraph 2, was arbitrary. A judge elected to fill a vacancy should be eligible for re-election if less than half of the predecessor's term remained to be completed. Articles 39, 43 and 44 should be merged. Ensuring the safety of witnesses should be a task of the Registrar under the supervision of the President of the Court, with the assistance of the Prosecutor.

126. In article 42, paragraph 1, the reference should be to the "Regulations of the Court" rather than "Rules of Procedure and Evidence". Regarding paragraph 2, the criterion of nationality should be maintained, because a judge might simply be partial because he had the same nationality as a party to the case in question. A judge should also be able to disqualify himself in the circumstances covered by that article. Under paragraph 3, any interested party, including the Prosecutor, the accused, or an interested State, should have the right to request disqualification.

127. In article 43, paragraph 4, the Prosecutor and his deputies should be elected by secret ballot by a two-thirds majority of the States present and voting. Under article 44, the Registrar should be elected by the States parties and not the judges. The judges, the Prosecutor and the Registrar should all serve the same renewable term of five years.

128. He agreed with the deletion of article 45, paragraph 4, as acceptance of seconded staff might result in abuses. In article 47, paragraph 2, the second subparagraph (c) should be deleted.

129. In article 49, he agreed with paragraph 1, with the removal of the square brackets, and also supported paragraph 3. In article 52, he agreed with option 2, but a two-thirds majority should be needed.

130. **Ms. MAKELA** (Finland) said that both the Registrar and the Prosecutor should be independent of the Presidency, and both they and their deputies should be elected by the States parties. States parties should also decide as to their possible removal from office. She was in favour of the provision in article 43, paragraph 9, that the Prosecutor should appoint advisers with legal expertise on specific issues including sexual and gender violence and violence against children. The Victims and Witnesses Unit should be in a neutral location in the Registry.

131. **Ms. BRADY** (Australia) said that she would like the deletion of the reference to "an interested State" in article 42, paragraph 3. She would like to retain article 43, paragraph 9, regarding the appointment of advisers with expertise on issues including sexual violence and violence against children. Regarding article 43, paragraph 10, the provision of protective measures for prosecution witnesses should be dealt with by the Victims and Witnesses Unit covered by article 44, paragraph 4. That paragraph should be retained. However, the provision in article 43, paragraph 10, requiring the Office of the Prosecutor to include staff with expertise in trauma, including trauma related to crimes of sexual violence, should also be retained.

132. **Mr. Young-wook CHUN** (Republic of Korea) said that he would prefer, in paragraph 2 of article 42, not to include the text in brackets regarding the nationality of the judge. He supported restricting the right, in paragraph 3 of article 42, to request the disqualification of a judge to the Prosecutor and the accused. In paragraph 1 of article 43, all the brackets should be removed. He had no problem with the bracketed text in paragraph 9 of article 43. In article 44, paragraph 2, the Deputy Registrar should be appointed by the Registrar. He supported the provision in article 44, paragraph 4. Finally, in article 52, paragraph 1, he preferred option 2.

The meeting rose at 6.45 p.m.